



November 14, 2006

Via Federal Express

National Indian Gaming Commission
1441 L Street, NW, Suite 9100
Washington, D.C. 20005
Attn: Penny Coleman, Acting General Counsel

Re: IGT Comments on Class II Classification Standards

Dear Ms. Coleman:

This letter comments on the Proposed Rule regarding the classification of games under the Indian Gaming Regulatory Act ("IGRA") published by the National Indian Gaming Commission ("NIGC" or "Commission") on May 25, 2006. IGT previously submitted extensive comments through correspondence to the NIGC regarding the Commission's efforts to establish technical standards, definitions, and classification regulations for Class II gaming. Copies of those comments are attached for your convenience and reference. We ask that those previous comments be made part of the record in this rulemaking.

IGT considers the proposed classification standards to be arbitrary and ambiguous. Tribal operations of Class II games should be economically meaningful and be allowed to be competitive with non-tribal facilities in an ever changing gaming environment while continuing to reflect the objectives of the IGRA. Doing so comports with the intent of IGRA to allow gaming as a means for tribes to promote tribal economic development, self-sufficiency and strong tribal governments.

IGRA defines Class II gaming and specifically defines bingo by three statutory criteria, namely (i) games played for prizes, (ii) games in which the holder covers numbers when objects are drawn or electronically determined and (iii) games in which the game is won by the first person covering a previously designated arrangement of numbers. These three statutory criteria, along with competition among players, must continue to be the fundamental principles on which a game classification is based. Therefore, as IGT has stated previously, the Commission should avoid placing additional restrictions and limitations upon bingo, and should not hinder Class II gaming by denying technology that is widely available to charitable bingo operations. Tribal operations of Class II games should be allowed to be competitive.

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In its preamble, the Commission asserts that IGRA's "three simple statutory criteria" are being blurred by technological advances. The Commission uses this justification to draw new and different lines, adding multiple new criteria governing the play of the game of bingo when played with a technological aid. Those additional criteria will improperly limit games of bingo and similar games to fewer variations than were available at the time IGRA was enacted.

The proposed classification standards continue to be problematic, do not make the game of bingo played with technologic aids any more a game of bingo, and may in fact create a new game that would not be played in session bingo.

IGT objects to the proposed rules and requests they be withdrawn in their entirety based, in part, on the following reasons:

- The proposed facsimile definition provides no certainty that a game otherwise compliant with the NIGC's classification standards for a technologic aid would not also be deemed an impermissible facsimile. The definition is, thus, wholly unsatisfactory.
- The proposed rules would impose requirements not previously needed for a game to fall within the category of Class II gaming.
- No game currently classified as Class II by the courts or the NIGC meets the proposed requirements. All games currently in operation would require replacement within a brief timeframe, which may never happen based on economic considerations.
- Because the United States Department of Justice still contends the proposed regulations concern games that violate the Johnson Act, even tribes and game manufacturers that fully comply with the NIGC proposal could still face civil enforcement actions or even criminal proceedings brought by the Department of Justice.
- The proposed rules place restrictions on the game of bingo not envisioned by Congress when IGRA was enacted.
- Games meeting the proposed requirements are likely to be unattractive to players.
- The promulgation of these rules would likely lead to major litigation about their validity.
- The proposed rules would have a devastating economic impact to Indian gaming.
- The proposed rules would put tribes at a significant competitive disadvantage compared to electronic bingo games permitted to non-Indians under state law.
- As proposed, the regulations would charge independent testing laboratories with assessing and enforcing legal standards.
- The certification process is, at best, uncertain given the ability of the NIGC Chair to object to an issued certification *at any time*.
- The proposed rules provide no ability to seek review or appeal of a testing laboratory's negative findings.

Based on costs associated with developing a game with questionable economic viability, the legal uncertainties associated with the proposed rules and a diminishing market, we believe that most, if not all, of the major manufacturers will be forced out of the Class II market.

As with our previous comment letters, rather than repeat arguments previously submitted, the summary below highlights important issues that arose previously and remain in the current draft. IGT also provides some additional comments on key regulatory issues and some provisions appearing for the first time in this proposed rule.

While IGT's objections to the proposed rules are many, a number of provisions in particular exemplify how the proposal would impose arbitrary restrictions on Class II games. These comments below demonstrate how the proposal is without legal basis and does not appropriately serve the regulatory purpose. If the Commission chooses to go forward with these regulations in their current form, IGT asks that the following provisions be removed:

- i. Section 546.4(c): requiring use of five by five grid bingo cards;
- ii. Section 546.4(l): consolation prize awarded only after a subsequent release of randomly drawn or electronically determined numbers has been made;
- iii. Section 546.5(a): permitting games that use ball draws numbered only from 1 through 75;
- iv. Section 546.5(i): establishing a minimum two seconds after the completion of each release of numbers for players to complete each cover (daub), and, in addition, determining that the game not proceed until at least one player has covered (daubed) the selected numbers;
- v. Section 546.6(b): the requirement that each player be eligible to compete for all winning patterns in the game;
- vi. Section 546.6(c): requiring for multiple ball releases, that releases may not be instantaneous, and that each release must take two seconds;
- vii. Section 546.6(i): permitting "bonus prizes," but only through additional
 - i. releases and daubs, with each (release/daub) cycle adding an additional four
 - ii. seconds to game play and
- viii. Section 546.6(l) the requirement that each game provide an equal chance of obtaining any winning pattern.

Should the Commission determine to continue the rule making process in light of these objections, IGT requests that the following comments be taken into consideration.

Facsimile Definition

The draft regulations include a revised definition of "*Electronic or electromechanical facsimile*" at Section 502.8. IGT sees no positive effect from the splitting of the facsimile

definition into two regulatory proposals, as the NGIC has done here. Sections (a) and (b), separately proposed as a new facsimile definition, would, by itself, constitute a ban on all electronic aids to Class II gaming. Apparently, the NIGC intended that ban to be ameliorated by compliance with the classification regulations, and provides such exemption, through a proposed section (c) of 502.8 in the larger classification proposal. As discussed below, the unclear wording of the overall proposed facsimile definition, it is not clear that the change would be anything but confusing, creating a risk of significant sanctions growing out of that confusion, or at least a chilling effect on the industry. IGT continues to encourage the Commission to not change the current definition of *electronic or electromechanical facsimile*; the definition developed in the 2002 regulations is an appropriate representation of existing case law and provides more than an adequate basis for a game classification under IGRA. As required by the courts, the existing definition clearly distinguishes facsimiles from games in which the electronic format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine. IGT disagrees with the argument that the current facsimile definition would permit operation of facsimiles as a Class II game. As such, IGT asks that the Commission's 2002 definition of "*electronic or electromechanical facsimile*" not be revised as it relates to bingo.

As suggested in IGT's previous comments, if the Commission is unwilling to remove this proposed definition, it should revise the proposal to clarify that a prohibited facsimile is one which not only incorporates all game characteristics into an electronic format, *but also* permits a player to play the game against the machine rather than with or against other players. This clarification would avoid the current outcome which would outlaw all forms of wholly electronic games, including those previously approved both by the NIGC and the federal courts. The classification standards are themselves unclear and subject to challenge; they are insufficient to resolve the unjustified risk created by the NIGC's proposal that facsimile be defined as proposed in new sections 502.8(a) and (b).

As previously stated, IGT believes the proposed definition, if adopted as written, would disallow, or at least severely impede, all electronically assisted Class II gaming.

Bingo Card Configuration

As noted in IGT's previous comment letter, sections 546.4(b) and (c), when read together, imply that *all* bingo cards utilized in a game, including multiple cards that are not required to be displayed, must contain a five by five grid of spaces. We continue to believe that this requirement is arbitrary and capricious and that the regulations should be flexible and additions or enhancements to cards should not be restricted. To this end, we recommend that section 546.4(c) be deleted in its entirety. Alternatively, the first sentence of this section should be removed thereby omitting the limitation to the use of only a five by five grid bingo card. (Recommended changes to section 546.4(b) are addressed below.) Bingo permits variations in card configuration; on that basis so did NIGC game classification opinions. Allowing flexibility improves the game of bingo, adds excitement, and helps broaden participation.

Session bingo permits variations on card size and numbers drawn. It should also be noted that internationally, a pool of 90 numbers is typically used rather than the 75 mandated by the proposed rule. Additionally, in certain domestic locations “speed games” may be played on three by three tiles with no free space. There is no basis to require at least 25 spaces on a bingo card, or the draw of numbers one through 75, especially when the Commission has agreed previously that other configurations are permissible. The minimum number of grid space is two, since a minimum of two spaces is necessary to form a pattern. If, however, the Commission requires that a five by five card with 75 numbers be used in the game of bingo, IGT recommends that the requirement be limited to the card applicable to the bingo game-winning pattern. Allowing other patterns such as interim, consolation, and bonus patterns to be achieved using additional card areas not limited to a five by five card requirement gives greater flexibility and adds excitement to the overall bingo game. These are issues of game design, which, insofar as the bingo requirements are already met, are open to regulation by the Tribe, and need not be restricted by the NIGC.

Bingo card specifications should be flexible. Additions or enhancements to cards should not be restricted in a manner that consigns all variation to Class III status. Allowing flexibility improves the game of bingo, adds excitement, and helps broaden participation by attracting additional players. Technology is changing rapidly. The Commission’s regulations should not restrict innovative technology that helps to increase the profitability and success of tribal Class II games.

Player Station Display

The internal characteristics of Class II devices have always been different from a slot machine in that results are determined by player competition in a common Class II game, rather than individual play against a random number generator. The additional requirements contained within the proposed rule, however, place greater significance on the game’s appearance than on the game’s underlying logic or legal basis. Doing so is a reversal of existing case law.

Furthermore, section 546.4(b) requires the player have the capability of seeing each one of his cards when using multiple electronic cards. It is common for bingo minders to allow players to play 75 or more cards simultaneously. Since it is not practical to show all cards at the same time, only the best card or cards are shown. A similar rule should apply to Class II bingo aids. Accordingly, we recommend that section 546.4(b) be modified to read as follows:

“The electronic card in use by a player must be displayed prominently on a video screen of the electronic player station utilized by the player and must be clearly visible to that player at all times during game play, except when multiple electronic cards are used. If multiple electronic cards are used by a player, the player must be capable of independently seeing each one of his or her cards. At the conclusion of the game, each player must see his or her

card with the highest value prize or, if no prize was won, the card closest to a bingo win.”

The proposed regulations would inappropriately require that the cards measure no less than 2 inches by 2 inches or four square inches, if other than a square card is used. There is no legal basis for so precise a standard for card size. Such inflexible requirements would impair future creativity. Requirements such as this do not allow for further technical advances and harm the economic viability of the game. We therefore request that section 546.4(b) be modified to permit variation in size of the bingo card so long as the relevant numbers or designations are clearly legible to the player.

Another new requirement states that while the results of the Class II game may be presented through an alternative display, that alternative may consume no more than 49 percent of the game’s display space. IGT objects to requiring that more than one-half of the total space available for display be exclusive of any “alternative display”. Because the term “alternative display” is ambiguous and undefined, if its elements are to be accorded such critical importance in a classification scheme bearing criminal penalties, then IGT asks that the Commission define alternative display. In section 546.4(o), the player must have the option to not view the alternative display. An alternative display may include game theme graphics, spinning reels, or other imagery. The results may also be displayed on mechanical reels. While turning off a video display so that it cannot be viewed by the player is feasible, this is not the case with mechanical reels. IGT requests that the regulations, taken together, not preclude mechanical reels from being visible to the player but allow the option to not activate. The first sentence in section 546.4(o) should be modified to read:

“A player station may offer an alternative display of the results of the game in addition to the display of the game results on the electronic bingo card, provided that the player has the option to play using only the electronic card display.”

Moreover, and presumably to further ensure distinctions perceptible to the casual eye, the proposed regulations would also require a player terminal to display the following legend, in two-inch letters: “THIS IS A GAME OF BINGO,” or “THIS IS A GAME SIMILAR TO BINGO.” If the NIGC retains this particular requirement, IGT suggests that all other limitations being placed upon the game should be removed as this alone is sufficient to alleviate any confusion between the exterior appearance of a Class II and a Class III game.

While many intensively regulated commercial gambling jurisdictions and Class III jurisdictions may have requirements that certain information such as rules, paytables, age restrictions or periodic payment schemes be displayed, none mandate the size or location of the display. If the NIGC continues to require a notice alerting the customer that the game in play is bingo or pull tabs, then it should permit such alternative labeling as has been determined acceptable for important customer notices in other gaming jurisdictions.

Importantly, these restrictive requirements add little to the substantive distinctions between Class II and Class III play, but would, taken together, limit not only any future change in playing format but also the range and scope of future technological advances. If the NIGC wishes to require some cosmetic distinctions in Class II games, then such cosmetic considerations should not consume more than 50 percent of the game's surface; labeling requirements need not be more stringent than those required by other jurisdictions to alert players to game limitations.

Regulations on Prize Amounts Are Unnecessarily Restrictive

IGT continues to believe that nothing in the statute, regulations, or judicial precedent justifies imposing a minimum prize limit as proposed in section 546.4(j). This section would require that game-winning prizes be no less than 20 percent of the amount wagered and at least one cent. IGT believes that prize amounts are marketing decisions that are beyond the scope of IGRA and that should be determined by the Tribe. Establishing prize value requirements in no way helps to distinguish between Class II and Class III games. IGT therefore recommends that the last sentence of section 546.4(j) be deleted from the proposed rule.

Lastly, section 546.6(n) inappropriately requires that, in the event that the first player eligible to daub the game winning pattern sleeps the bingo, then the subsequent winner of a prize must be awarded the same amount that would have been available to the first player (who failed to daub). This requirement could unreasonably award an unwarranted high bingo prize to a player in the same game, but playing at a lower denomination. Instead, so long as the manner in which the prize is calculated remains the same (subject only to multiplication to reflect level of play), the regulation should permit comparison of the amount slept with the amount ultimately claimed, and award the winner the lesser of the two. As we have discussed more fully in previous comments, having the ability to award the lesser of the two is an important component of maintaining game integrity by limiting player collusion and cheating of the game. As currently written, §546.6(n) unnecessarily jeopardizes the integrity of the game.

"Other Games Similar to Bingo"

As we have expressed in previous submissions, IGT believes that the Commission's regulations should foster flexibility. Additions or enhancements to the range of numbers or other designations and the size of the cards should be allowed so that more patterns can be offered, and in varying combinations. Flexibility should be available for other games similar to bingo without restricting variation only to the size of the ball draw and of the card in play, with strict ratio applicable even to those variants. The NIGC has provided no reason for imposing such limitations, especially as related to games *similar* to bingo. As a game category enumerated separately from "bingo" in the statute, "games similar to bingo" should encompass a range of games that complements bingo itself, and is not just a single trivial variation. As a matter of statutory construction, the Commission should not regulate as though Congress intended the provision of games similar to bingo to authorize nothing

more than a practical nullity. Instead, IGT suggests that allowing for emerging technology would enhance games of bingo and games similar to bingo, by adding excitement, and to broadening participation through appealing to a larger pool of players. Sections 546.5(a)(b)(c) and (d) contain language that would unreasonably restrict variations to the game of bingo and IGT respectfully requests that the Commission's regulations not restrict innovative technology that helps to increase the profitability and success of tribes that offer Class II games.

Daubing Through the Use of an Agent Is Acceptable

IGT has submitted substantial comments – including legal support for our position – throughout the informal drafting process regarding player interaction and we again respectfully request that these previous comments be made a part of the formal record. Despite the overwhelming support for our position, several sections of the proposed rule continue to address daubing in the same manner as the previous drafts. These sections require that three “overt” actions be taken by the player during each game and include minimum timing requirements for those actions. For the reasons previously provided, IGT continues to believe that adoption of these sections would improperly prohibit the use of an otherwise acceptable technologic aid in connection with a Class II bingo game. We again request that all references to manual daubing, as well as all unnecessary game delays, be removed from the proposed rule.

Additionally, IGT does not believe that physically (or electronically) daubing numbers at the time the number is released is required as a fundamental characteristic of the game of bingo. One of the basic concepts of bingo is that the player is buying an opportunity to participate in a game. As long as the player rightfully purchased a bingo card and recognizes and claims that they have achieved bingo, they should be considered a participant in the game. *When* the player chooses to cover or daub numbers in order to claim their prize is irrelevant.

Sleeping Interim or Consolation Prizes

IGT has provided extensive comments regarding the sleeping of prizes. The proposed rules continue to address sleeping in an inappropriate manner. For reasons already provided, IGT recommends that these sections be deleted because the proposed restrictions conflict with the common game of bingo and unnecessarily restrict flexibility.

In bingo, players that become distracted, or otherwise fail to mark a number on their card(s), may “catch up” at any time before the prize associated with that number is awarded. Whether that number was eventually needed to complete the game-winning pattern rather than some other pattern is entirely irrelevant. In the event section 546.5(j) remains a part of the proposed rules, we recommend that it be modified as follows to more properly reflect the game of bingo:

“Players must cover after a release of numbers or other designations to win the prize associated with any winning pattern obtained in that release. If a

player “sleeps,” i.e., fails to cover after a release of numbers or other designations, that player cannot be awarded a prize based on a winning pattern obtained in that release. Such player, however, may cover the slept number(s) or other designations in a subsequent release (“catch-up”) and win the prize associated with any winning pattern obtained in that subsequent release. A prize associated with a previously slept pattern may only be won upon a subsequent release of numbers or other designations and a successful covering of the numbers or other designations in that release.”

The provisions of section 546.5(j) also pose an apparent conflict to the players. Under that rule, players would sleep all numbers not daubed, except that a player could “catch up” in a subsequent release/daub cycle, but only for the purpose of an additional chance to achieve the game winning pattern. We continue to renew our objections to these refashioned rules that govern sleeping. In session bingo, and subject to house rules, a bingo player who fails to daub sleeps a *pattern* and not an individual number or other designation. Catching up in subsequent daubs is customarily permissible until the game ends subject to *house* rules. The same principles should be applied here. If the NIGC wishes to conform to more traditional bingo practice, it has no basis for creating new sleeping rules which should remain the prerogative of the operator. Again, not only do these requirements limit the economic viability of the game, but they will also add to player confusion.

Broadening Participation Need Not Require Increasing the Number of Players in Each Game

Section 546.6(a) would require that a linked system wait for either two seconds or six players before a game may begin. As indicated throughout this process, IGT strongly discourages such a requirement. IGT believes that this requirement is without legal basis. A game of bingo merely requires “players,” a requirement met simply with more than one.

“Broadening participation” in each play of each game is *not* a requirement for Class II technologic aids. That equipment broadens participation levels in a common game is merely one factor indicating that it is a technologic aid, rather than a required element. This view has been upheld by the courts and IGT believes that the Commission should not impose more restrictive requirements upon game play. To implement a “two second/six player” requirement would not “broaden participation,” but would more likely have the effect of extinguishing Class II gaming altogether, particularly in sparsely attended facilities, or at times of minimal play. By imposing such significant delays at the beginning of each game, the proposed regulations would harshly create the broadest distinction between Class II and Class III play. Instead, IGT suggests that the game be permitted to proceed so long as two players have joined, with perhaps some modest (fractional second) additional time to permit other players to participate. The second portion of section 546.6(a) should be revised to read:

“The system must require a minimum of two players for each game, however, be designed to provide opportunity for more than two players to

participate in each common game. Nothing in this section is intended to limit participation to two players.”

The true purpose for seeking broadened participation is to distinguish the permissible use of technology that enables players to play with or against each other rather than with or against a machine. (S. Rep. No 446, 100th Cong., 2d Sess.9 (1988)). Since that fundamental characteristic is satisfied by meeting the three characteristics in the Class II game of bingo, there is no reason to impose additional requirements such as delays or artificial player minimums. The intent of ensuring that players are not playing alone against a machine is satisfied by mandating two players in a game. A bingo game is no less bingo if only two players are participating. Requiring more than two players in a common game is unnecessary and without legal support. Requiring additional player interaction does not protect the logic of the game, nor does it do anything but limit game attractiveness, and ultimately, achieving the opposite of broadening participation in Class II play.

In addition, increasing the number of participants in a common game is only one way in which participation can be broadened. Participation levels can also be increased by allowing players at different buy-in levels to compete against each other and by linking together multi-denomination games. Utilizing a variety of game themes and entertaining displays make games more entertaining, and also attracts additional players, who may then be grouped into games with each other. Because the broadening of participation can take many forms, it is important that the totality of a game’s characteristics be examined in determining whether the electronic equipment utilized with a Class II game broadens participation levels in a common game.

Unnecessary Delays in Game Play

Sections 546.5(f) and (i) require that the player daub after every ball release and a minimum of two seconds be provided after the completion of each release. Section 546.6(a) requires a two second delay for a game to begin unless six players have joined the game. As stated previously, IGT objects to these requirements and requests that they be deleted from the proposed rule. Section 546.5(i) appears to conflict with the statements in the preamble. It is not clear whether the NIGC intends to permit the game to proceed once all players have daubed, which would be a reasonable result, or whether the game must arbitrarily pause for two seconds, even if all have daubed, merely to add time to the game cycle. IGT would object to this, along with other such unsupported time additions, as unnecessarily burdensome. Such delays would also add to player confusion as their actions are met with no response. We, therefore, recommend that all such delays be removed from the proposal.

Sections 546.6(c) and (d), which require multiple ball releases before a player may achieve the game winning pattern, and that the numbers be released one at a time are proposals which have no basis in bingo or law. Significantly, current technological limitations related to the rate at which video display may be refreshed, as well as physical limitations on the rate the human eye may perceive images when each number must be released sequentially, will further slow the play of the game. Due to these limitations, unnecessary

delays would further degrade the economic viability of the gaming operation. We object to these requirements, which do no more than create new rules for bingo, and new means to delay play of a technologically aided game.

Different Interim Patterns Are Permissible Within A Common Game

IGT has submitted significant comments regarding previous versions of sections 546.6(b) and (l) that prohibit players in the same game from competing for different patterns and prizes. Again, we ask that this information be included in the record for this rulemaking. IGT continues to believe that the interim patterns and prizes remain a part of the larger game – a game in which players, playing with cards bearing numbers, cover corresponding numbers as they are drawn, and are awarded prizes based on covering pre-determined patterns. Regardless of the game's interim events, players continue to compete within the "game," and the "game" is still *won* by the first player to cover the game-winning pattern. Because the statutory requirements of "bingo" continue to be satisfied, IGT believes that varying interim patterns and prizes do not cause the game to fall outside the definition of bingo.

Further, these requirements may serve to limit rather than broaden participation. Offering interim events with different patterns and prizes allows the operators flexibility in setting payback percentages and frequency of hits. By requiring that all players compete for all winning patterns and that each game provide an equal chance of obtaining any winning pattern, players would have to compete against each other with like games, thus segmenting the games into smaller sub-groups. This fragmenting will make it more difficult to achieve minimum game size and limit the size of the player pool thus narrowing participation. A more specific explanation regarding this limitation is attached as Exhibit A and should be incorporated by reference to the comments.

Bingo operators often adjust the buy in and/or prize limits based on the day of week, time of day, month, etc. As with many other industries, it is not uncommon for operators to have the ability to anticipate attendance; therefore, adjustments are made to benefit both the player and operator. By not allowing a similar flexibility for technologic aids in bingo, operators would be limited in their ability to leverage machines for maximum economic benefit. To alleviate these negative impacts, IGT recommends that these sections be deleted from the regulation. At a minimum, section 546.6(b) should be amended by deleting the phrase "so long as all prizes are based on achieving pre-designated winning patterns common for all players" from the end of the section. Furthermore, section 546.6(l) should be amended by deleting its first two sentences.

Testing and Certification of Class II Products

Section 546.9 sets forth the NIGC's proposed process for approval and verification of Class II products under the Game Classification regulations. This section contains provisions for game certification by independent testing laboratories. There are no provisions addressing changes or modifications to games once they have been certified. IGT suggests that regulations be included permitting modifications to the game which do not alter the

essential classification elements of the game which would not require re-certification. For example, Nevada regulations permit changes such as replacement of one component with another pre-approved component; or the rebuilding of a previously approved device with pre-approved components or configuration. Restrictions placed upon Indian country should not be more stringent than those placed upon commercial gaming jurisdictions such as Nevada.

IGT is concerned that sections 546.9(b)(2) and (d)(2) do not adequately address or protect the confidential and proprietary nature of information that may be included in the report prepared by the gaming laboratory. We request these paragraphs be revised to allow the report to be redacted before release to a third party to protect confidential information.

IGT commends the Commission for revising paragraph (c) of this section to consider portions of reports by independent testing laboratories confidential. IGT however continues to be concerned about the lack of a process for determining what constitutes confidential and proprietary information. Under this section of the regulation the determination of the confidential portions of a report that relates to a vendor's product should be conducted in consultation with the vendor. Furthermore, there still does not appear to be a process that requires the Commission to provide notice to a vendor of a request to review a certification, nor does the vendor have an opportunity to object to the release of a specific report. As such, IGT continues to suggest deleting the last sentence of proposed section 546.9(c) so that only a generalized listing of certified Class II products is available to the public. IGT further suggests, that as a tribal requirement, tribes receive a statement from the vendor attesting the "electronic, computer, or other technologic aid" provided to the tribal gaming operation that no classification elements have changed.

Section 546.9(e) of the regulation contains provisions that would allow the Chairman to object to a testing laboratory certification. The draft regulations allow for such an objection to occur not only within 60 days of the issuance of a laboratory report but also that the Chairman of the Commission may object -for the first time - at *any* time subsequent to the 60-day period, even after the placement of the products. Given the financial investment the company has in the Class II market, as well as in the gaming industry as a whole, IGT finds this provision wholly unacceptable. Furthermore, IGT believes that the NIGC should be required to make an affirmative decision with regard to the permissibility of each game. As currently written, section 546.9(e)(1) provides that "[i]n the absence of objection within 60 days, the parties may assume the Chairman does not interpose an objection." Other jurisdictions in which IGT is licensed to do business are likely to find such an "assumption" suspect, and tribes are likely to require an affirmative decision before placement, particularly since the "good cause" provision leaves any certification open to challenge. To provide only an "assumption" that a certification is valid places manufacturers licensed to do business in other jurisdictions at a competitive disadvantage. This provision should be deleted from the regulation. IGT suggests, in the alternative, the regulation provide for a secondary approval to be issued by the Commission within 60 days of certification by a testing laboratory. Further, the regulations should provide the Commission the ability to

suspend or revoke an approval where it is shown that there is a failure of a technological standard, the requesting party misrepresented its product, or the testing laboratory committed a material error in its testing.

IGT is further concerned with the fact that the proposed rules shift responsibility for the classification process from tribal regulators and the NIGC, to private sector gaming laboratories. Nothing in IGRA suggests that testing laboratories should be placed in the position of interpreting IGRA. Instead, their role should be limited to ensuring the integrity of equipment and operating systems. The process set forth in the current draft not only deprives tribal regulators of their legitimate regulatory authority over Class II gaming, but relinquishes a critical federal responsibility to the private sector and interferes with the right of tribes to full due process of law. It is incumbent on the Commission to provide adequate guidance to the testing laboratories and to dictate the testing process to test in accordance with adopted technical standards. IGT suggests the Commission develop testing guidelines in the form of a checklist for use by the laboratories. Please refer to Exhibit B for a New Gaming Device Submission Package developed by the Nevada Gaming Control Board to be completed by a manufacturer seeking testing of their gaming products. The use of such a checklist will afford consistency and fairness in the testing process. To further provide for fairness and consistency, the NIGC should be involved in overseeing and ratifying the outcome of test lab certification. This would result in an agency action permitting review.

Finally, the proposed regulations continue to lack any opportunity for outside challenge of a negative determination by the testing laboratory. Given the controversy of the substance of these classification regulations, and the potential for significant adverse economic impact in the event of a negative determination in reliance on the final rules, IGT believes that there should be some structure in place to permit an immediate challenge to the application of the classification provisions should that application prevent play of a proposed game. Once a negative report has been issued, the Commission should either permit a challenge before it, or adopt the determination as binding and final for the NIGC, so that a party adversely affected may have full opportunity to question the outcome without having to face enforcement proceedings.

Regulatory Matters and Economic Impact

IGT also questions statements made by the Commission within the "regulatory matters" portion of the preamble. In two separate locations, the Commission asserts that this rulemaking will not have an annual impact on the economy of more than \$100 million dollars. Given our vast experience in the gaming industry, we find this statement implausible.

Many factors should be considered in assessing the economic impact of the proposed rules, not the least of which is the decrease in revenue for Class II tribal gaming operations, due, in part, to the increase in length of time to play a game and questionable player appeal of the game. Fewer games would be able to be played within a given time period reducing revenue a proportional amount. IGT believes the decrease in revenue for Class II gaming

operations alone would be in excess of \$1 billion annually. IGT believes games that would meet the requirements of the classification standards would not be attractive to players as play would be slower and the rules confusing. Tribal gaming revenue would be further reduced as dissatisfied players would either choose to not play the games or choose to play more entertaining games offered in jurisdictions where tribes are forced to compete with non-tribal operations. As revenue from tribal gaming operations degrades, tribes would have limited access to capital for improvements or expansions and tribal social programs. Please refer to Exhibit C for an economic impact study commissioned by IGT.

We do not believe there are any Class II gaming systems currently in operation that would meet the proposed standards. Consequently, Class II gaming operations would be forced to replace games currently on their floor in an abbreviated timeframe in order to be in compliance with these standards. Due to the cost associated with developing and placing games that meet these standards amid questionable commercial viability and legal uncertainty associated with the proposed rules, IGT and other manufacturers may choose not to produce these games. Tribes would have fewer options in choosing vendors and pricing models would be less competitive. The promulgation of the proposed rules would have a devastating impact on tribal Class II gaming and would likely extinguish it.

Reasonable Compliance Timeline Issues

According to section 546.10(e), existing operations have six months to come into compliance with the final rule. However, paragraph 3 of that section states that any game placed into operation after the effective date of the final rule must be certified by the tribal gaming commission as meeting the requirements of the final rule prior to being put into operation. Therefore, the games must have the two-inch letters, appropriate screen sizes, incorporate the appropriate time delays, common patterns, correct prize structures, etc., as required by the final rule. It is IGT's estimate that, should we go forward with developing gaming products meeting the requirements, it would take in excess of 24 months before such games could be made available to tribes after publication of the final rule.

Before a game can be placed into operation, the following steps must be taken. First, the final rule will have to be reviewed and its requirements incorporated into our existing Class II game platform. Internal testing and review will then be required to ensure compliance and game integrity. We estimate this will take between 4 to 6 months. Our games will then be sent to an outside testing lab for additional testing and certification. Given that all other vendors will be doing the same, and that the testing laboratories will likely be experiencing a backlog and further delays would be likely. In our experience, certification of a new game platform may take up to 90 days. The Chairman would then have 60 days in which to object to a testing laboratory's certification. Once we have received certification of the Class II game platform prototypes and the 60 day objection period has passed, we would begin transforming our remaining game faces to the compliant platform at a rate of approximately two per week. With our current library of game theme offerings, this would take in excess of nine months. Only after receiving such certification for a significant number of themes, would we begin to offer the approved games. Installation would be

dependent on availability of qualified staff. IGT would have to assess whether it is commercially reasonable to dedicate time and resources to developing a product with questionable viability subject to an uncertain certification process for use in a shrinking market.

Because it is unlikely that the development of compliant games could occur within six months of publication of the final rule, tribes will be unable to place additional games for an extended period of time. Even games already in place at the time the regulations are implemented would be required to receive certification within six months. Currently there are no games developed or placed that meet the proposed standards. Games already in place would need to be removed if they could not be certified within the proposed timeframe. New games must be certified before placement. Given the start-up nature of this ambitious certification program, it is likely to take upwards of 24 months for a game system with a commercially reasonable number of game themes to receive a positive outcome from the proposed process. Tribes should not be subjected to such a delay. Consequently, it is IGT's recommendation that the six month requirement within both sections 546.10(e)(1) and (2) be extended to a more realistic 30 to 36 months, and that section 546.10(e)(3) be deleted from the regulation to prevent unnecessary financial harm to tribes during the transition period, particularly, barring all new tribal operations from opening.

Additionally, IGT recommends the Commission include a mechanism in the rules to protect the security and integrity of Class II games and to ensure compliance with the regulations creating an even playing field providing certainty that all participants are accountable to the same standards.

The intent of IGRA is to allow games as a means for tribes to promote tribal economic development, self-sufficiency and strong tribal government. The imposition of arbitrary restrictions on the game of bingo when played using technologic aids would negatively affect the economic viability of tribal gaming operations by making the games less appealing to the player and less efficient for the tribal operator. The proposed regulations do nothing to increase the game's nature as a bingo game.

The Commission contends the line between Class II and Class III games has blurred, and the regulations are needed to provide a clear distinction between the two classes. IGT commends the Commission for recognizing the need to provide clarity within the law but we do not believe the rules, as proposed, will provide the desired result. IGT respectfully requests the Commission withdraw the proposed rules, facsimile definition and technical standards in their entirety and should the Commission desire, IGT would offer any assistance in drafting rules.

Furthermore, given the far-reaching impacts that these regulations have on the entire tribal gaming industry, IGT requests that, should the Commission go forward with the rule making process, at the conclusion of this comment period and subsequent redrafting, both

Penny Coleman, Acting General Counsel

November 14, 2006

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this regulation and the technical standards be published again as proposed rules. We also request that the Commission allow the interested parties the ability to further supplement comments based on an evaluation of the newly released analytical reports to analyze the economic impact of the proposed classification regulations commissioned by the NIGC when reviewed together with these regulations. Doing so will permit both the industry and the NIGC to ensure that the least restrictive means are utilized to accomplish the NIGC's stated goals in drafting the regulations.

I hope this information is helpful to the Commission during the formal rule-making process. Please feel free to contact me at (702) 896-8746 if you have any questions or would like additional information. I can also be reached by email at michelle.chatigny@igt.com. Thank you in advance for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Michelle Chatigny / by [initials]". The signature is fluid and cursive.

Michelle Chatigny
Vice President Compliance

MC:GB:PB:pb
Enclosures

IGT PREVIOUS COMMENT LETTERS

VIA FACSIMILIE TRANSMISSION
AND U.S. MAIL

May 25, 2005

Philip N. Hogen, Chairman
National Indian Gaming Commission
1441 L St., N.W.
Suite 9100
Washington, D.C. 20005

Dear Chairman Hogen:

On May 5, 2005, the National Indian Gaming Commission (Commission) issued the Fifth Draft of the Classification Standards. The purpose of this letter is to provide additional comments on the Fifth Draft of the Classification Standards. As previously indicated, IGT has submitted extensive comments on the Commission's prior draft regulations. These previous comments remain valid and should be read together with this letter.

IGT commends the Commission for removing the language regarding card-minding products and believes that the removal of this section from the draft regulation is appropriate. In addition, IGT appreciates that the Commission has reinserted the language allowing for different entertaining displays such as mechanical reels and other graphics. It appears that this language had been inadvertently deleted from the Fourth Draft of the proposed regulations.

IGT continues to be concerned, however, that the restrictions and limitations contained in the Fifth Draft could materially impact the viability of the Class II market as a whole. IGT believes that the regulations should be drafted to allow maximum flexibility and innovations in technology. Tribal operation of Class II games should be allowed to be competitive in an ever expanding gaming environment while continuing to be reflective of the objectives of the Native American Class II market. This comports with the intent of IGRA to allow gaming activity as a means for tribes to promote tribal economic development, self-sufficiency and strong tribal governments.

As with IGT's previous comment letter, rather than repeat arguments previously submitted, the summary below primarily highlights important issues that arose previously and that remain in the Fifth Draft. IGT also provides some additional comments on key regulatory issues and some provisions appearing for the first time in the fifth draft.

Definitions

The draft regulations include a revised definition of “*Electronic or electromechanical facsimile*” at Section 502.8. Although the Commission made a minor revision to this section, IGT continues to encourage the Commission not to change the current definition of *electronic or electromechanical facsimile* as it is believed that the definition developed in the 2002 regulations is correct and appropriate. IGT believes that the existing definition clearly distinguishes facsimiles from games in which the electronic format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine. IGT disagrees with the argument that the current definition would permit operation of facsimiles as a Class II game. As such, IGT believes that the Commission’s 2002 definition of “*electronic or electromechanical facsimile*” should not be revised and that the proposed definition contained in the Fourth Draft (and minimally revised in the Fifth Draft) should be deleted in its entirety.

As suggested in IGT’s previous comment letter, if the Commission is unwilling to remove this proposed definition, then at the very least, it must revise the proposal to clarify that a prohibited facsimile is one which not only incorporates all game characteristics into electronic format *but also* permits a player to play the game against the machine rather than with or against other players. This clarification would avoid the outcome that continues in the Fifth Draft, which would outlaw all forms of electronic games, including those previously approved both by the NIGC and the federal courts. The new language in the Fifth draft, appearing to exempt from facsimile status any device that complies with Part 546, merely highlights the confusion and uncertainty that would be created by the proposed new definition. If anything, the facsimile definition might use the proposed language in subsection (c) without subsections (a) and (b) to clarify that compliance with Part 546 alone is sufficient to distinguish a technological aid from a facsimile.

Bingo Card Requirements

As contained in IGT’s previous comment letter, sections 546(4)(b) and (c), when read together, imply that all bingo cards utilized in a game, including multiple cards that are not required to be displayed, must contain a five (5) by five (5) grid of spaces. Although the Commission revised section 546(b) to clarify that, at the end of the game each player must see the card with the highest value prize or the card closest to a bingo win, this does not resolve IGT’s concern that all bingo cards consist of a five by five grid, even if among multiple cards. IGT continues to believe that the regulations should be flexible and that additions or enhancements to cards should not be restricted. Allowing flexibility improves the game of bingo, adds excitement, and helps broaden participation.

If, however, the Commission believes that a five by five card with 75 numbers must be used in the game of bingo, IGT recommends that the requirement be limited to the card applicable to the bingo game-winning pattern. Allowing other patterns such as interim, consolation, and bonus patterns to be achieved using additional card areas not limited to a five by five card requirement gives greater flexibility and adds excitement to the overall bingo game.

Lastly, IGT commends the Commission for removing the requirement in section 546(5)(b) that, in an other game similar to bingo, the numbers or other designations used in the game must be randomly drawn or determined electronically from a non-replaceable pool of such numbers or other designations which is equal to or greater than three (3) times the number of spaces on the card used in the game. IGT believes that deleting the phrase "equal to three times" is appropriate and allows for flexibility for games similar to bingo.

Regulations on Prize Amounts Are Restrictive

IGT continues to believe that nothing in the statute, regulations, or judicial precedent justifies imposing a minimum prize limit as proposed in section 546(4)(i). This section would require that game-winning prizes must be no less than 20% of the amount wagered and at least one cent. IGT believes that prize amounts are marketing decisions that are beyond the scope of the Indian Gaming Regulatory Act (Act) and that should be determined by the Tribe. Establishing prize value requirements in no way helps to distinguish between Class II and Class III games.

In addition, section 546(4)(m) contains additional provisions relating to prizes in the game of bingo. IGT seeks clarification as to whether this section prohibits promotional prizes that enhance player participation and excitement. For example, many jurisdictions allow for promotional or complimentary services or items, including cash or non-cash gifts, to reward players for their patronage. These promotional items may be awarded to patrons based on play at a tribal location. As such, IGT seeks clarification that the provisions contained in the current draft do not prohibit the award of promotional prizes and that the scope of such prizes are clearly identified in the regulation.

Lastly, there should be nothing in the regulations that prohibits the prize amount associated with the game-winning pattern from changing in the event one or more players sleep the pattern. In other words, while the manner in which the prize is calculated remains the same, this configuration would permit comparison of the amount slept with the amount ultimately claimed, and award the winner the lesser of the two. Having the ability to award the lesser of the two is an important component of maintaining game integrity by limiting player collusion and cheating of the game.

To illustrate, it is common practice for a player's potential prize to increase as their buy-in level increases. Under §546.6(m), however, in the event the first player with the game-winning pattern sleeps, "the same value prize must be awarded to a subsequent game-winning player in the game." Assuming that two players are competing against each other in a common game, and that one is wagering one credit and the other is wagering maximum credits, the expected prize under this language may vary drastically in the event one player sleeps. Most troubling, however, is that these two players could conspire, enter the same game, and cooperate with each other so that the person playing the lower denomination always sleeps the bingo to ensure that the person playing the higher denomination would win the greater amount available. The investment for such certainty for the larger wager would be minimal. Limiting the value of a bingo prize subsequent to a slept bingo would deter such collusion. IGT believes that any regulation avoiding this protection would be inappropriately defeat measures to enhance the integrity of the games and deter cheating and team play.

Multiple Ball Releases Should Not Be Required In Class II Bingo

As with all previous drafts, the Fifth Draft prohibits award of any prizes in a bingo game before the random draw or electronic determination and release of no less than two sets of numbers or other designations. This type of requirement as to any bingo prize is arbitrary, has no basis under IGRA, and case precedent prevents the application of this requirement as it relates to interim or bonus patterns. As such, IGT recommends revising the sections of the draft regulation that require multiple ball releases in order to achieve *any* pattern to allow secondary prizes such as interim and bonus prizes to be won in one ball release.

In addition, the Fifth Draft continues to prohibit the use of pre-drawn balls for games similar to bingo. IGT believes that the Commission should reconsider this position and should allow for pre-drawn balls for games similar to bingo.

Daubing Through the Use of an Agent Is Acceptable

IGT has submitted substantial comments, including legal support for our position, throughout this informal rule-making process regarding player interaction. Several sections of the Fifth Draft continue to address daubing in the same manner as the Fourth Draft. These sections require that three manual actions be taken by the player during each game and include minimum timing requirements for those actions. For the reasons provided in great detail in previous comments, IGT continues to believe that adoption of these sections would improperly prohibit the use of an otherwise acceptable technologic aid in connection with a Class II bingo game.

"Sleeping" Interim or Consolation Prizes

Section 546(5)(j) provides the following: "For bonus prizes (interim or consolation) and progressive prizes, if a player "sleeps," i.e. fails to cover one or more numbers or other designations, that player cannot be awarded such prize based on a winning pattern which contains one or more of the numbers or other designations slept by the player." This language prohibits the award of interim or consolation prizes if a player has previously failed to cover one or more numbers or other designations comprising an interim or consolation pattern.

While IGT believes that it might be reasonable for a player who sleeps an interim or consolation pattern to lose the ability to win the prize associated with that pattern, it is not prudent to prohibit that player from later utilizing those same numbers to win an alternate or lesser prize if successfully daubed during the game. In fact, there is nothing in traditional bingo, that prohibits a player from "catching up" any slept number and then winning an interim or consolation prize. In traditional bingo, a player who becomes distracted, or otherwise fails to mark a number on the bingo card, may "catch up" at any time before the prize associated with that number is awarded. Because the proposed restrictions conflict with the common game of bingo and unnecessarily restrict flexibility, IGT recommends that they be deleted from the draft.

Along these same lines, another part of the regulation proposes to treat "sleeping" differently when the same numbers are required to obtain different patterns. As drafted, the penalty for

sleeping discussed above does not apply to numbers when they comprise the game-winning pattern. This disparate treatment is sure to create confusion and dissatisfaction among customers. It will also lead to difficulty in complying with Section 546(5)(l), which requires that all slept numbers and patterns be clearly identified. That clarity will be lost if slept numbers may be recovered for one purpose but not others. IGT urges that the Commission retain the traditional bingo practice of penalizing "sleeping" through the one time loss of patterns, but permit catching up, to a limited extent, within the rules of play.

Broadening Participation Is Not Required

As previously commented, section 546(6)(a) would require that a linked system wait for either two seconds or six players before a game may begin. As indicated throughout this informal process, IGT strongly discourages such a requirement. IGT believes that this requirement is without legal basis.

"Broadening participation" in each game is *not* a requirement of all technologic aids. That equipment broadens participation levels in a common game is merely one factor indicating that it is a technologic aid, rather than a required element. This view has been upheld by the courts and IGT believes that the Commission should not impose more restrictive requirements upon game play. To implement a "two second/six player" requirement would not "broaden participation," but would more likely have the effect of extinguishing Class II gaming altogether, particularly in sparsely attended facilities, or at times of minimal play. By imposing such significant delays at the beginning of each game, the proposed regulations would harshly create the broadest distinction between Class II and Class III play.

The true purpose for seeking broadened participation is to ensure that players play with or against each other rather than with or against a machine. Since that fundamental characteristic is satisfied in the Class II game of bingo, there is no reason to impose additional requirements such as delays or artificial player minimums. The intent of ensuring that players are not playing alone, against a machine, is satisfied by the involvement of two players. A bingo game is no less bingo if only two players are participating. Requiring more than two players in a common game is unnecessary and without legal support.

In addition, increasing the number of participants in a common game is only one way in which participation can be broadened. Participation levels can also be increased by allowing players at different buy-in levels to compete against each other and by linking together multi-denomination games. Utilizing a variety of game themes and entertaining displays makes games more entertaining, also attracting additional players, who may then be grouped into games with each other. Because the broadening of participation can take many forms, it is important that the totality of a game's characteristics be examined in determining whether the electronic equipment utilized with a Class II game broadens participation levels in a common game.

Different Interim Patterns Are Permissible Within A Common Game

IGT has submitted significant comments regarding sections 546(6)(b) and (j) that prohibit players in the same game from competing for different patterns and prizes. IGT continues to

believe that the interim patterns and prizes remain a part of the larger game – a game in which players, playing with cards bearing numbers, cover corresponding numbers as they are drawn, and are awarded prizes based on covering pre-determined patterns. Regardless of the game's interim events, players continue to compete within the “game,” and the “game” is still *won* by the first player to cover the game-winning pattern. Because the statutory requirements of “bingo” continue to be satisfied, IGT believes that varying interim patterns and prizes do not cause the game to fall outside the definition of bingo.

Testing and Certification of Class II Products

Section 546(9), previously numbered section 546(10), sets forth the process for approval and verification of Class II products under the Game Classification regulations. This section contains provisions for game certification by independent testing laboratories. IGT commends the Commission for revising paragraph (c) of this section to consider portions of reports by independent testing laboratories confidential. However, IGT continues to be worried about the lack of a process for determining what constitutes confidential and proprietary information under this section of the regulation in that it does not appear that a vendor would have the ability to provide input as to what is considered confidential in a report that relates to a vendor's product. Furthermore, there still does not appear to be a process that requires the Commission to provide notice to a vendor of a request to review a certification nor does the vendor have an opportunity to object to release of a specific report. As such, IGT continues to suggest deleting the last sentence of this section so that only a generalized listing of certified Class II products is available to the public.

Section 546(10)(e) of the regulations contains provisions that would allow for the Commission to object to a testing laboratory certification. The draft regulations allow for such an objection to occur not only within 60 days of the issuance of a laboratory report but also that the Chairman of the Commission may object – for the first time -- at any time subsequent to the 60 day period, even after the placement of the products. IGT commends the Commission for adding language that an objection by the Commission beyond the 60-day period must be for “good cause shown.” However, IGT continues to believe that a more reasonable timeframe for the Commission to object to a lab certification would be 10 days. IGT believes that a process that allows for the invalidation of a certification at any time, including after the placement of games, could be costly for both the tribes and the vendors.

Finally, the proposed regulations continue to lack any opportunity for challenge of a negative determination by the testing laboratory. Given the controversy of the substance of these classification regulations, and the potential for significant adverse economic impact in the event of a negative determination in reliance on the final rules, IGT believes that there should be some structure in place to permit an immediate challenge to the application of the classification provisions should that application prevent play of a proposed game. Once a negative report has been issued, the Commission should either permit a challenge before it, or adopt the determination as binding and final for the NIGC, so that a party adversely affected may have full opportunity to question the outcome without having to face enforcement proceedings.

Philip N. Hogen, Chairman

May 25, 2005

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I hope this information is helpful to the Commission during the rule-making process. IGT plans to remain involved as the Commission enters the formal rule-making phase. Please feel free to contact me at (702) 896-8755 if you have any questions or would like additional information. I can also be reached by email at susan.carletta@igt.com. Thank you, in advance, for your consideration.

Sincerely,

Susan Carletta
Regulatory Compliance Manager

VIA FACSIMILIE TRANSMISSION
AND U.S. MAIL

February 17, 2005

Philip N. Hogen, Chairman
National Indian Gaming Commission
1441 L St., N.W.
Suite 9100
Washington, D.C. 20005

Dear Chairman Hogen:

On January 14, 2005, the National Indian Gaming Commission (Commission) issued the Fourth Draft of the Classification Standards. The purpose of this letter is to provide additional comments on the Fourth Draft of the Classification Standards.

As you know, IGT has submitted comments to each of the Commission's prior draft regulations. These previous comments remain valid and should be read together with this letter. While we recognize that some changes have been made in response to earlier comments by the Advisory Committee and outside interested parties, we are concerned that the long list of arbitrary technical specifications continues to predominate in a way that may substantially impede development and implementation of tribal gaming. Rather than repeat arguments previously submitted, we summarize most of those below, highlighting primarily issues that have arisen anew in the most recent draft.

As previously observed, the provisions contained in the draft regulations focus heavily on legal aspects of Class II gaming. As the Commission is aware, case law over the last several years has resolved several issues in the Class II arena and this case law has been overwhelmingly favorable to the tribes. IGT believes that the Commission should not take a different approach from the decisions established by case law and should in no way overturn interpretations that have already been addressed and resolved by the courts.

As a general comment IGT would like to reiterate that we recognize the importance of the Commission's responsibility to distinguish Class II games from those used in Class III gaming. IGT believes that many features of today's technologic aids used in the play of bingo differentiate themselves from Class III devices. First, the game being played is bingo – cards are utilized, numbers are covered, and every game must have a winner. This is not how Class III gaming devices operate. Equally significant, bingo terminals must be linked so that players are playing against each other in a common bingo game, players utilize a shared ball draw, and all

elements of chance occur outside the terminals. Unless linked to the system and without the participation of at least two players, the individual bingo terminals are incapable of play. It is therefore impossible for a player to play against a machine rather than with or against other players. So long as these restrictions are in place, there is no confusion between Class II game play and the operation of Class III gaming devices. Lastly, Class II bingo games are not banked games – the house is not a participant in the game and the house cannot win. Once these factors are established, Class II bingo terminals resemble Class III devices only superficially. Instead of this approach, the Commission's rather arbitrary selection of certain technical issues as being "key" to Class II gaming is creating an environment of uncertainty as to the future of Class II gaming.

As the Commission is aware, tribes and vendors have invested substantially in reliance on earlier regulations, court decisions, and Commission guidance, and these investments are vulnerable as a result of the uncertainty under the current rulemaking. IGT continues to be concerned that the restrictions and limitations contained in the draft regulations could materially impact the viability of the Class II market as a whole. One important point to consider is that the Commission's proposed rules are in direct conflict with the goals and intent of Congress when it enacted the Indian Gaming Regulatory Act (IGRA). The conflict is created by rules that constrict game design so far as to destroy marketability. An example of this is the requirement that all players in a bingo game be playing for common interim, bonus, and consolation patterns. By creating this requirement, the Commission would substantially limit game design options and the variety of games offered to players. As the variety of games offered to players is reduced, players in turn are provided a substantially diminished entertainment experience. The end result is that revenues to the tribal operators are impaired -- hindering the tribes' economic development.

IGT believes that the regulations should instead be drafted in a technologically neutral manner to ensure that maximum flexibility and innovative in technology can be utilized. As you know, Congress has placed only three requirements on a game of bingo. The courts have held that these three requirements "constitute the sole legal requirements for a game to count as class II bingo," and have continuously rejected attempts to engraft additional requirements onto the definition. As such, IGT believes that the Commission should avoid placing additional restrictions and limitations upon bingo, and particularly should not hinder Class II by denying technology widely available to charitable bingo operations. Tribal operation of Class II games should be allowed to be competitive in an ever expanding gaming environment while continuing to be reflective of the objectives of the Native American Class II market. This comports with the intent of IGRA to allow gaming activity as a means for tribes to promote tribal economic development, self-sufficiency and strong tribal governments.

Below please find IGT's comments on specific sections of the Classification Standards along with suggestions for improvements.

The Fourth Draft of the Regulations Contains Arbitrary Technical Specifications

The proposed Fourth Draft continues to incorporate a collection of arbitrary technical specifications that function not to preserve a line between Class II and Class III gaming as envisioned by Congress, but rather to create a wholly separate category of gaming handicapped

by limitations and a misunderstanding of significant features of Class II play. IGT urges the Commission to refocus its attention on the play of Class II games, as defined by Congress and reflected in traditional play, and to ensure that tribes are permitted technological aids to the play of the full range of these games. To do so, the Commission should not create new game rules such as time delays between and during games, minimum player participation (both as to player numbers and frequency of individual interactions), unprecedented rules such as the “n-1” draw requirements, and rules regarding minimum prize amounts. Further the Commission should not return to a position that restores the limitation of “similar to bingo” games to the functional identity to “Bingo,” and it should embrace the trend in judicial interpretation of IGRA that forces the rejection of the wholly artificial distinction between electronic bingo cards and electronic pull tabs.

Definitions

The draft regulations include a revised definition of “*Electronic or electromechanical facsimile*” at Section 502.8. IGT submitted extensive comments regarding this proposed revision by letter dated November 28, 2004. IGT continues to encourage the Commission not to change the current definition of *electronic or electromechanical facsimile* as the definition developed in the 2002 regulations is correct and appropriate.

IGT remains sensitive to the fact that facsimiles are not permissible in Class II gaming, yet believes the current definition to be clear that so long as the electronic format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine, such games are not facsimiles. We disagree with those who claim that, as defined, facsimiles are seemingly permitted as a Class II game. As such, IGT believes that the Commission’s 2002 definition of “*electronic or electromechanical facsimile*” should not be revised and that the proposed definition contained in the Fourth Draft should be deleted in its entirety.

If the Commission is unwilling to remove this proposed definition, then at the very least, it must revise the proposal to clarify that a prohibited facsimile is one which not only incorporates all game characteristics into electronic format but also permits a player to play the game against the machine rather than with or against other players. That clarification would avoid the outcome threatened by the current proposal, which would outlaw all forms of electronic games, including those previously approved both by the NIGC and the federal courts.

Lastly, IGT commends the Commission on its decision to remove the house banking aspect of “other games similar to bingo” which was previously contained in the third draft of the regulations (and in the 2002 definitional regulations). The context of previous drafts indicated that the Commission had been attempting to create a new definition of house banked by asserting that games similar to bingo utilizing “a payout table or targeted retention ratio or return-to-player percentage” are “house banked and not eligible for a Class II determination.” This position marked a sharp divergence not only from case law, but also from Commission precedent and IGT agrees that it is appropriate to remove this language from the draft regulations. Please refer to the section identified below for other comments relating to the provisions of “other games similar to bingo.”

Bingo Card Requirements

Section 546(4)(c) requires that, for a game of bingo, each card must contain a five (5) by five (5) grid of spaces. Section 546(4)(b) provides that multiple cards may be used and that only the electronic card closest to a bingo win must be displayed. Read together, these sections imply that all bingo cards utilized in a game, including multiple cards that are not required to be displayed, must contain a five (5) by five (5) grid of spaces.

IGT believes that the regulations should allow for flexibility and that additions or enhancements to cards should not be restricted. This type of technical requirement goes beyond the scope of the intent of Congress in enacting IGRA. IGT believes it improper to specify that all bingo cards be square, that they be a five by five grid, and that any card, even if among multiple cards in play or concurrently displayed, have the specified minimum size. Instead, allowing flexibility improves the game of bingo, adds excitement, and helps broaden participation.

In the alternative, if the Commission believes that a five by five card with 75 numbers must be used in the game of bingo, IGT recommends that the requirement be limited to the card applicable to the bingo game-winning pattern. Allowing other patterns such as interim, consolation, and bonus patterns to be achieved using additional card areas not limited to a five by five card requirement gives greater flexibility and adds excitement to the overall bingo game.

Lastly, IGT is also concerned that the restrictive interpretation of bingo to the five by five card, with 75 numbers drawn unnecessarily and improperly shifts to “similar to bingo” many games that wholly satisfy the statutory criteria for bingo. Even though such games may still be played with technological aids, games that are classified as “similar to bingo” may only be played in locations in which bingo is played, thus limiting the availability of technological aids utilizing any but the five by five grid cards. There is no rational basis for creating such a limitation that can so severely hinder tribal economic opportunity.

Regulations on Prize Amounts Are Restrictive

Proposed Section 546(4)(i) requires that a game-winning prize be no less than 20% of the amount wagered and at least one cent. IGT continues to believe that prize amounts are marketing decisions that are beyond the scope of the Act and that should be determined by the Tribe. Prize values in no way distinguish between Class II and Class III games and, again, there appears to be no rational basis for such a requirement. Nothing in the statute, relevant regulations, or judicial precedent justifies imposing limitations upon prize amounts. As such, references that require a specific or minimum prize should be removed from the draft.

Multiple Ball Releases Should Not Be Required In Class II Bingo

The proposed regulations require that prizes in a bingo game must be awarded in a random draw or electronic determination and release of numbers or other designations that is no more than the exact quantity of numbers or designation that are needed for the game-winning player to achieve the game-winning pattern. This type of requirement is arbitrary and has no basis under IGRA.

In fact, case precedent specifically prevents application of the two release minimum to interim or bonus patterns. For example, in the MegaMania case, players compete both for the game-winning pattern and for secondary prizes associated with a portion of the game called "CornerMania." In this case, the Court of Appeals held that CornerMania does not change MegaMania's status as a Class II game.

To summarize, CornerMania is played along with the primary game and is won by a player who covers two, three, or four corners on a card. Each game will have a winner of both the primary MegaMania game and the secondary CornerMania game. In the event the MegaMania game is won before CornerMania, balls continue to be released, three at a time, until the CornerMania game is won.

Because in the game of MegaMania, balls are released to the players three at a time, a player can potentially achieve a two or a three corner pattern with just one release of balls. As such, a player might win the prize associated with CornerMania in the *first* release of balls. The court held that this potential CornerMania outcome does not convert MegaMania into a Class III game. The court's reasoning compels the conclusion that multiple releases are not required in association with secondary or interim portions of a Class II game.

IGT strongly recommends sections of the draft regulation that require multiple ball releases in order to achieve *any* pattern be revised to allow secondary prizes such as interim and bonus prizes to be won in one ball release.

The Fourth Draft also creates an arbitrary distinction between "interim" and "consolation" prizes, with the two classes separated by the game winning prize claim. To the extent that this distinction requires different patterns for the two categories of prizes, it has no basis and is unnecessarily restrictive on game play. The creation of two classes of bonus prizes adds nothing to the distinct identification of Class II game play, and should be removed.

Other Prizes, Such As Promotional Prizes, Should be Allowed

Section 546(4)(m) contains provisions relating to prizes in the game of bingo. It is unclear whether this section could, in effect, prohibit promotional prizes that enhance player participation and excitement. For example, many jurisdictions allow for promotional or complimentary services or items, including cash or non-cash gifts, to reward players for their patronage. These promotional items may be awarded to patrons based on play at a tribal location. As such, IGT seeks clarification that the provisions contained in the current draft do not prohibit the award of promotional prizes and that the scope of such prizes are clearly identified in the regulation.

"Other Games Similar to Bingo"

Section 546(5)(a) contains language that requires that, in "Bingo," 75 numbers or other designations be drawn or electronically determined. In addition, Section 546(5)(b) contains the following language: "As a variant of bingo, in an other game similar to bingo, the numbers or other designations used in the game must be randomly drawn or determined electronically from a

non-replaceable pool of such numbers or other designations which is equal to or greater than three (3) times the number of spaces on the card used in the game.”

As indicated above under the section on ***Bingo Card Requirements***, IGT believes that the Commission’s regulations should foster flexibility and that additions or enhancements to the numbers or other designations and the cards should be allowed so that more patterns can be offered. Flexibility should be available for other games similar to bingo with no arbitrary limitations that attempt to require a fixed number of 75 numbers or other designations and that attempts to fix the ratio of randomly drawn balls to the number of spaces on a card. IGT can think of no reason for imposing such limitations especially as it relates to games similar to bingo and would argue that instead, allowing for emerging technology enhances the game of bingo, adds excitement, and helps to broaden participation. The Commission’s regulations should not restrict innovative technology that helps to increase the profitability and success of tribes that offer Class II games.

Also, please note that Section 546(5)(c) contains the following language: “Cards containing pre-selected numbers or other designations may not be used.” This sentence is confusing in that the bingo cards, in fact, must have numbers or other designations on them in order for the play of bingo to occur. A player can choose to change the card on the terminal before play begins. It is believed that the Commission meant to require that pre-selected or pre-drawn balls cannot be used and, as such, this section should be revised to contain the correct language.

Daubing Through the Use of an Agent Is Acceptable

IGT has submitted substantial comments, including legal support for our position, throughout this informal rule-making process regarding player interaction. As with previous drafts of the regulations, there are several sections of the Fourth Draft that address daubing. These sections require that three manual actions be taken by the player during each game and include minimum timing requirements for those actions. IGT continues to believe that adoption of these sections would improperly prohibit the use of an otherwise acceptable technologic aid in connection with a Class II bingo game.

As indicated above, IGT recognizes the importance of distinguishing Class II devices from those reserved for Class III gaming. However, IGT believes that prohibiting a daub assistance or “auto-daub” type feature is not necessary to preserve this distinction. For the following reasons, IGT believes that this type of prohibition is imprudent and should not be included in the Commission’s draft regulations.

As you know, both the courts and the Commission have found the act of electronic daubing to be an acceptable method by which players can cover numbers on their bingo card(s). The courts have said that the manner in which a player “covers” numbers is irrelevant. The statutory requirements are satisfied so long as numbers *are* covered when similarly numbered objects are drawn or electronically determined. IGT observes that nothing in IGRA prevents a game of bingo from employing a feature that assists a player in daubing. To the contrary, IGRA expressly permits the use of technologic aids in the play of a Class II game, and we note further that the use of “agents” has also been upheld through judicial precedent.

The term “auto-daub” has been used to refer to a family of features whereby a player is aided in covering numbers on their card(s). In one version, the player has to manually elect to employ this assistance. In other versions, auto-daub is the default; it is always on and it aids the player without further prompting. When choosing to cover the numbers on their card using an aid such as auto-daub, players are in essence seeking assistance similar to that offered by devices known as “bingo minders.” These devices, in use nationwide at Indian and charitable bingo locations, monitor the game’s progression and automatically cover all matching numbers on each of the player’s cards. Input by the operator of the game (typically, the bingo caller), and not the player, causes the numbers on the player’s card(s) to be covered. After the player enters her identification number, no additional interaction is required between that player and the device; all additional occurrences can be fully automatic. A player using a bingo minder *holds* the device, which assists the player by covering numbers on each of his or her cards. In many halls, the player is responsible for claiming the prize by yelling “Bingo!” when a pattern is matched. The more complex electronic player station merely adds an entertaining display of game outcome to functions already carried out by the daubing of the bingo minder devices. Electronic player stations do not incorporate the ball draw; as with bingo minders, all elements of chance occur outside the device. The more sophisticated technological aids involve more equipment, perhaps, but not a fundamental change in function from a bingo minder.

In analyzing devices similar to these and finding them to be Class II aids, the Commission also evaluated the use of “agents” in the play of a bingo game. Auto-daub, when present, serves as the player’s agent, with the acts of the agent deemed to be the acts of the player. It cannot play independent of the player, and it has no impact on the outcome of the game. Incorporating the benefits of a reader/dauber device into another Class II bingo game is merely the natural progression of changing technology, as well as the natural progression of daubing through means of an electronic player station.

Significantly, the incorporation of auto-daub does not eliminate the statutory requirement that the holder of a card “cover numbers” when they are drawn or electronically determined. Even when auto-daub is utilized, the sequencing of the game remains intact. The player, through use of an agent, does not perform the daubing function until *after* each release of balls, thereby satisfying the sequencing requirement in IGRA that the “holder . . . covers numbers or designations . . . when objects, similarly numbered or designated, are . . . electronically determined.” IGT respectfully notes that maintaining proper game sequencing seems to be a more appropriate focus for the Commission’s technical standards than limiting flexibility through the prohibition of legally sound game features.

Even with the addition of auto-daub, each of IGRA’s requirements of “bingo” continue to be satisfied. In other words, the game continues to conform to the statutory requirements as one that is played for prizes with cards bearing numbers or other designations, in which the holder of the card covers these items when similar objects are drawn or electronically determined, and the game continues to be won by the first person who covers a designated pattern on their card. Auto-daub simply aids players in the playing of the game by enabling them, through use of agents, to daub each release of balls at the appropriate time during the game’s natural progression. It should also be noted that in traditional bingo, a player wins bingo regardless of whether the player daubed numbers based on the release of balls. Instead, a player wins bingo

based on matching the balls released to a predetermined pattern on the bingo card. The physical act of daubing is not required for a player to claim a bingo win.

In addition, the statutes and regulations of several jurisdictions that currently allow bingo games for charitable or nonprofit purposes have been reviewed. Several of these jurisdictions including Louisiana, Missouri, and Washington, allow the use of electronic bingo card dauber devices that are defined similarly in the various regulations. Throughout the regulations of various jurisdictions, the term is commonly defined as an electronic device used by a bingo player to monitor bingo cards purchased and to electronically mark a player's bingo cards. In accordance with IGRA, tribal operations should be allowed the full scope of Class II gaming permitted to others, and not be burdened with restrictions not applicable at competing charitable bingo operations.

Lastly, Section 546(5)(i) requires that a minimum of two seconds be provided after each release of numbers for players to complete each daub opportunity and that the game may not proceed until at least one player has covered the numbers appearing on their card. IGT believes that such requirements are without legal basis and are not appropriate for the regulation. Section 546(5)(e) should also be revised to allow players to cover by touching either the screen or *any* button on the player station and not just a single designated button.

"Sleeping" Interim or Consolation Prizes

Section 546(5)(j) provides the following: "For bonus prizes (interim or consolation) and progressive prizes, if a player "sleeps," i.e. fails to cover one or more numbers or other designations, that player cannot be awarded such prize based on a winning pattern which contains one or more of the numbers or other designations slept by the player." This language prohibits the award of interim or consolation prizes if a player fails to cover one or more numbers or other designations comprising an interim or consolation pattern. In addition, during a recent public Tribal Advisory Committee meeting, it was indicated that this requirement is being considered because players should be penalized for sleeping interim or consolation patterns.

While IGT believes that it might be reasonable for a player who sleeps an interim or consolation pattern to lose the ability to win the prize associated with that pattern, it is not prudent to prohibit that player from later utilizing those same numbers to win an alternate or lesser prize if successfully daubed during the game. In fact, there is nothing in traditional bingo, that prohibits a player from "catching up" any slept number and then winning an interim or consolation prize. In traditional bingo, a player who becomes distracted, or otherwise fails to mark a number on the bingo card, may "catch up" at any time before the prize associated with that number is awarded. Because the proposed restrictions conflict with the common game of bingo and unnecessarily restrict flexibility, IGT recommends that they be deleted from the draft.

Further, another part of the new regulations proposes to treat "sleeping" differently for the same numbers when considered for different prizes. As drafted, the penalty for sleeping does not apply to numbers in considering eligibility for the game-winning prize. That disparate treatment is sure to create confusion and dissatisfaction among customers, as well as complicating

compliance with another proposed regulation, set forth at Section 546(5)(l), that all slept numbers and patterns be clearly identified. That clarity will be lost if slept numbers may be recovered for one purpose but not others. IGT urges that the Commission retain the traditional bingo practice of penalizing “sleeping” through the one time loss of patterns, but permit catching up, to a limited extent, within the rules of play.

Broadening Participation Is Not Required

Section 546(6)(a) would require that a linked system wait for either two seconds or six players before a game may begin. As indicated throughout this informal process, IGT strongly discourages such a requirement. IGT believes that this requirement is without legal basis.

“Broadening participation” in each game is *not* a requirement of all technologic aids. That equipment broadens participation levels in a common game is merely one factor indicating that it is a technologic aid, rather than a required element. This view has been upheld by the courts and IGT believes that the Commission should not impose more restrictive requirements upon game play. To implement a “two second/six player” requirement would not “broaden participation,” but would more likely have the effect of extinguishing Class II gaming altogether, particularly in sparsely attended facilities, or at times of minimal play. By imposing such significant delays at the beginning of each game, the proposed regulations would harshly create the broadest distinction between Class II and Class III play.

The true purpose for seeking broadened participation is to ensure that players play with or against each other rather than with or against a machine. Since that fundamental characteristic is satisfied in the Class II game of bingo, there is no reason to impose additional requirements such as delays or artificial player minimums. The intent of ensuring that players are not playing alone, against a machine, is satisfied by the involvement of two players. A bingo game is no less bingo if only two players are participating. Requiring more than two players in a common game is unnecessary.

In addition, increasing the number of participants in a common game is only one way in which participation can be broadened. Participation levels can also be increased by allowing players at different buy-in levels to compete against each other and by linking together multi-denomination games. Utilizing a variety of game themes and entertaining displays makes games more entertaining, also attracting additional players, who may then be grouped into games with each other. Because the broadening of participation can take many forms, it is important that the totality of a game’s characteristics be examined in determining whether the electronic equipment utilized with a Class II game broadens participation levels in a common game.

Different Interim Patterns Are Permissible Within A Common Game

Several sections of the regulations contain language that prohibits players in the same game from competing for different patterns and prizes (See Sections 546(6)(b), 546(6)(j)). As you know, throughout the informal rule-making process, IGT has continued to submit extensive comments to the Commission regarding interim patterns. IGT continues to believe that the interim patterns and prizes remain a part of the larger game – a game in which players, playing with cards

bearing numbers, cover corresponding numbers as they are drawn, and are awarded prizes based on covering pre-determined patterns. Regardless of the game's interim events, players continue to compete within the "game," and the "game" is still *won* by the first player to cover the game-winning pattern. Because the statutory requirements of "bingo" continue to be satisfied, IGT believes that varying interim patterns and prizes do not cause the game to fall outside the definition of bingo.

As previously indicated, courts and Commission precedent permit interim and/or consolation patterns and prizes in a game of bingo, and their presence has no material affect on the game's status as a Class II game. As such, IGT believes that the appropriate focus of a game classification analysis is whether the game "as a whole" meets the three statutory requirements of bingo.

Consequently, as to the interim events in a Class II game, the courts do not require competition for a singular prize, barring further winners. Nor do the courts require players to simultaneously match patterns in the hope of a tie. Instead, the courts have held that interim patterns and prizes may remain available as players participate in the overall game, regardless of the number of times those interim patterns may be won.

It should be noted that the judicial acceptance of varying features within the interim portions of the game is significant, particularly the ability of players to win multiple interim prizes at various stages of the game without impairing another's ability to win. The courts' recognition of multiple levels of competition within a Class II game of bingo is echoed by the Commission's intent of ensuring that players "play with or against each other rather than with or against a machine." Even where a common game contains different *interim* patterns, players continue to play "with or against each other" – players play *with* each other for interim patterns, and *against* each other for the game-winning pattern. Given that one player's achievement of an interim pattern is irrelevant to all other players, so too is the equivalent availability of these interim patterns.

Testing and Certification of Class II Products

Section 546(10) sets forth the process for approval and verification of Class II products under the Game Classification regulations. This section contains provisions for game certification by independent testing laboratories. Section 546(10)(c) contains a provision regarding the confidentiality of information contained in the test lab reports which reads as follows: "Reports and certifications by testing laboratories provided to the Commission will be available for review in Commission regional offices, except that confidential and proprietary information concerning the "electronic, computer, or other technologic aid" contained in the report will not be made available for public review.

Please note that IGT considers test lab reports to be confidential as they contain detailed proprietary information about the technical aspects of the products. While IGT does not object to the Commission making available to the public a generalized listing of all products that have been certified by a test lab, the detailed certification reports should not be made available for review at Commission offices. In addition, the process for determining what constitutes

confidential and proprietary information under this section of the regulation is worrisome in that it does not appear that a vendor would have the ability to provide input as to what is considered confidential in a report that relates to a vendor's product. Furthermore, there does not appear to

be a process that requires the Commission to provide notice to a vendor of a request to review a certification nor does the vendor have an opportunity to object to release of a specific report. As such, IGT suggests deleting the last sentence of this section so that only a generalized listing of certified Class II products is available to the public.

Section 546(10)(e) of the regulations contains provisions that would allow for the Commission to object to a testing laboratory certification. The draft regulations allow for such an objection to occur not only within 60 days of the issuance of a laboratory report but also that the Chairman of the Commission may object -- for the first time -- at any time subsequent to the 60 day period, even after the placement of the products.

The Commission should revise the proposed regulations to include a more reasonable timeframe in which the Commission can object to a lab certification. IGT believes that a reasonable timeframe for the Commission to object to a lab certification would be 10 days. As you know, IGT conducts business in numerous jurisdictions and is accustomed to obtaining game certification by independent testing laboratories in these various jurisdictions. Gaming regulatory agencies adopt technical standards relating to gaming products and rely on the certifications issued by the testing laboratories based on those standards. IGT believes that a process that allows for the invalidation of a certification at any time, including after the placement of games, could be costly for both the tribes and the vendors. At the very least, there should be some finality, and not the proposed open-ended opportunity for the Commission to reject an existing certification, upon which the tribes and the industry have relied.

As proposed, the overall certification process may violate the Federal Administrative Procedures Act in that they do not provide finality or a process for applicant objections. There is nothing in the regulation that provides for notification to a vendor or affected tribe(s) of a Commission objection nor is there an administrative process to appeal an objection through the Commission. During a recent Tribal Advisory Committee meeting, the Commission appeared to suggest using the Federal courts for any objection. IGT believes that a formal administrative process is more appropriate and that the judicial process should be a last resort. The proposed regulation also seems to disregard tribal gaming commission approvals and does not address how these approvals are considered in this process.

In addition, if a lab declines to certify a game under submission, the regulations must provide some opportunity to challenge a negative outcome -- for tribes or vendors seeking such Class II status. As currently drafted, there is no recourse or opportunity to challenge unless a tribe is willing to defy the laboratory finding, place the subject game and await Commission enforcement proceedings. That situation is no better than the current regulatory dilemma. Once the Commission has accepted a laboratory determination not to certify a game, then there should be a process in place for challenging the result.

Philip N. Hogen, Chairman

February 17, 2005

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I hope this information is helpful to the Commission during the rule-making process. IGT plans to remain involved as the Commission enters the formal rule-making phase. Please feel free to contact me at (702) 896-8755 if you have any questions or would like additional information. I can also be reached by email at susan.carletta@igt.com. Thank you, in advance, for your consideration.

Sincerely,

Susan Carletta

Regulatory Compliance Manager



VIA FEDERAL EXPRESS

November 22, 2004

Philip N. Hogen, Chairman
National Indian Gaming Commission
1441 L St., N.W.
Suite 9100
Washington, D.C. 20005

Dear Chairman Hogen:

As you know, IGT previously provided information to the National Indian Gaming Commission (Commission) in connection with the Commission's efforts to establish technical standards and regulations for Class II gaming. During this time, the Commission issued three drafts of the game classification and technical standards. The most recent draft dated September 27, 2004 included Classification Standards for Electronic, Computer or Other Technological Aids Used in Connection with Class II Gaming along with an initial release of Class II Technical Standards.

IGT applauds the Commission's efforts at establishing standards and regulations for Class II gaming. As previously indicated, it has been our experience from both a product and a regulatory standpoint, that regulations and technical standards are most effective when they allow for growth and advancements in technology. IGT believes that Class II should be a viable alternative to tribes who have been unsuccessful in obtaining tribal-State compacts and should offer tribes an opportunity to use the most advanced technology to ensure economic growth.

This submission provides comments on the Class II Technical Standards only. A comment letter on the Classification Standards for Electronic, Computer or Other Technological Aids Used in Connection with Class II Gaming will follow under separate cover within the next week.

In general, certain of the introductory pages of the technical standards use the term "gaming device" in reference to Class II games. IGT believes that the use of this term is not appropriate in a Class II environment and suggests that this term be modified to correctly refer to Class II electronic player stations or Class II game terminals.

Following are IGT's comments on the Class II Technical Standards. For ease of reference, the section is identified in bold followed by IGT's comments and, where appropriate, suggested language or recommended changes.

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CHRONO

Section 2.1.4(8), *Security for All Servers*, page 13. This section provides that “software packages that are not essential to the operation of the server must not be loaded onto the server.” IGT believes that there are many programs such as Notepad and Wordpad applications of Microsoft Windows that are useful to the operation of the server but not necessarily essential.

Programs that are useful to the operation of the server enhance the abilities and functions of the server. IGT believes that this requirement limits the ability to enhance the functionality of servers by limiting software packages to those that are essential to the operation of the server. As such, IGT recommends deleting this section from the draft standards or, in the alternative, seeks clarification as to the intent of this provision and the types of software packages that would be considered to fall within the scope of the provision.

Section 2.1.5(4), *Server Application Requirements*, page 14. This section requires that the server store significant events on the server or to a casino monitoring system. Paragraph 4 of this section contains a list of events that are considered “significant.” One such event is referred to as “Client Cash Clearance.” IGT respectfully requests that the Commission define this term as it is unclear and ambiguous in this context.

Section 2.1.5(9), *Server Application Requirements*, page 15. This section provides that the maximum number of machines enrolled at any one time can be no less than 6 machines. As previously indicated and as set forth in further detail below, there is no support for requiring more than two (2) players within a common game, just as there is no support for an argument that two players is insufficient to “broaden participation.” A game is no less bingo if only two players are participating.

Section 2.2.2(3), *Enable/Disable Requirements*, page 17. This section contains a requirements that relates to auditable alarms to be generated by either the client or the server. This is the first of many sections that contain language regarding auditable alarms. Please note that, in the North American gaming market, auditable alarms are not utilized. Instead, a combination of light tower flashing and the reporting of events to a system are standard technology. As such, IGT respectfully requests that the sections referencing auditable alarm be modified to reflect the technology currently utilized throughout the industry.

Section 2.4.1(1)(a), *Changes to Games and Sets of Games*, page 19. This section requires the bingo system to disable all client stations/bingo terminals attached to the system in order to change a set of games. Under the current draft, this disable feature would be required even for changes in a set of games on a single machine. IGT believes that this requirement is unreasonable in that it could necessitate the interruption of bingo game play to numerous games. Instead, IGT believes that this requirement should apply only to the machines that are being changed.

Section 2.4.1(2), *Changes to Games and Sets of Games*, page 19. This section reads as follows: “An automatic audit trail of all changes in the sets of games offered to players must be maintained. The audit trail must include the identity of the person making the changes, the time and date of the change, and the changes.” This section would require the identity of the person

making changes to the client stations/bingo terminals to be known. While it is possible for the bingo system to know the identity of the person making changes, this information is not supplied to the client state/bingo terminal. As such, IGT respectfully requests that this requirement be deleted.

Section 2.4.1(3)(a), *Changes to Games and Sets of Games*, page 19. This section requires the game pay tables be changeable only by a secure method and contains requirements specific to the addition of new game paytables. This section assumes that the paytables are stored in the system, however, not all manufacturer's games are produced in this manner. The Commission should be flexible and allow for different types of products to be freely placed in the Class II market.

Section 2.4.1(4), *Changes to Games and Sets of Games*, page 19. This section requires that an "automatic audit trail of all changes to pay tables be maintained. The audit trail must include the identity of the person making the changes, the time and date of the change, and the changes. At a minimum this means logging of the following transaction types: addition of new pay tables; deletion of pay tables; swapping to an existing pay table."

Section 2.4.2(2)(b), *Adding and Removing Games*, page 20. This section reads as follows: "A function to remove old games from the client/server system is permitted provided that: . . . b) there are not active players on any of the client stations." This section allows for the removal or addition of games to the system provided that, at the time of removal or addition, there are no active players on any of the terminals linked to the system. Due to the advanced technological design in system products, system functionality may allow for the removal or addition of games with no impact to the system or bingo terminals when a game is removed. As such, IGT recommends that this section either be deleted or that it be revised to authorize the removal or addition of games without interruption to all games on the system link.

Section 2.6(1), *Communications Protocol Requirements*, page 21. This section is the first of many sections that require communications to be encrypted. This section in particular provides that communications that traverse public areas must be encrypted and authenticated. Please note that encryption is not the standard used by gaming jurisdictions throughout the United States and many forms of communication operate in a secure manner without the need for encryption. IGT recommends revising this section to read as follows: "Communications that traverse public areas (including wireless communications) must be secure."

Section 2.7, *Failure/Recovery Scenarios*, page 20. This section contains the requirements that must be met that must be met with regard to terminal, server, and power failure. IGT respectfully requests clarification as to whether dual UPS protection will be sufficient to satisfy this section thus eliminating the potential for total power failures as identified under section 2.7(3).

Section 2.10(3), *Downloadable Software/Games*, page 22. This section uses the term "trading day" as a delineation for a timeframe for game play. IGT seeks clarification on the definition of the term "trading day" as that is not a term typically utilized in the gaming industry. In the

alternative, the Commission may want to consider using the term "business day" as that term is commonly used in various industries throughout the United States.

Section 2.10(6), *Downloadable Software/Games*, page 22. This section requires that all meters must be cleared after a successful download. This requirement seems to conflict with other requirements within the proposed technical standards such as under section 4.2.1.2. IGT believes that a master terminal meter set should remain intact at all possible times. In addition, this section improperly imposes a requirement that is no longer applicable since the advent of multi-denomination games. As such, IGT respectfully requests that this sub-section be revised to allow these types of meters to be retained.

Section 2.10(9), *Downloadable Software/Games*, page 22. Paragraph 9 of this section requires that the previously loaded program version remain intact in the terminal's memory in the event it might need to be reused at a later time. Since the terminal has the capability to download new programs, this requirement is not necessary. Additionally, storing a previous program version in the terminal's memory would only serve to add additional costs both to the manufacturer and the operator. As such, IGT respectfully requests that this requirement be deleted.

Section 3.3.2(11), *Door Access Detection Devices*, page 28. This section is unclear and, as such, IGT seeks clarification as to its intent.

Section 3.11, *Electromechanical Meters*, page 33. This sections sets for the requirements for hard meters on the bingo terminals. Please note that many jurisdictions throughout the United States have eliminated the requirement for mechanical meters as the technology is somewhat archaic and more updated reliable technology such as electronic meters has been developed. In light of this, IGT respectfully requests that hard meter requirements be eliminated from the Commissions technical standards.

Section 3.13.5, *Printers*, page 35. This section includes the requirements for products equipped with printers. Paragraph 2 of this section requires that a printer have the capability to simultaneously generate two identical copies of any printout with one copy to be ejected from the terminal and the other to be retained within the machine for audit purposes. Please note that the thermal printers that are commonly used in the gaming industry throughout the United States do not support two-ply printing. New printer technology would be necessary in order to facilitate this type of requirement as IGT is unaware of any such technology currently utilized in the U.S. gaming market. In addition, it should be noted that an audit trail would be created and maintained by the system. As such, IGT suggests that this requirement be revised to delete the requirement for the duplication of tickets.

Section 3.13.6, *Audible Alarm*, page 36. As indicated under Section 2.2 above, there are several sections that contain requirements relating to auditable alarms. Auditable alarms are not utilized in the North American gaming market. Instead, a combination of light tower flashing and the reporting of events to a system are standard technology. As such, IGT respectfully requests that the sections referencing auditable alarm be modified to reflect the technology currently utilized throughout the industry.

Section 4.1.3(1)b, c, d, e, *Detection of Corrupted Memory*, page 35. These subsections require that the entire contents of critical memory be verified before or after a number of different transactions occur. While verifying an individual critical data element prior to its usage is acceptable, IGT believes that verification of all critical data prior to the usage of just one element is over burdensome and unnecessary. As such, IGT requests that this sub-section be modified to require the verification of only the individual critical data element being accessed prior to usage.

Section 4.2.1, *Meters To Be Supported*, page 42. IGT requests a formal definition of the term "Progressive Occurrence Count" as IGT is not aware of any such meter utilized in the North American gaming market and is unclear as to what is intended with regard to this type of meter.

Section 4.2.5, *Self Audit Error Checking*, page 44. This section contains requirements on self-audit checks that would be required of all Class II products. IGT believes that this type of requirement is overly burdensome and will hinder technological advancements in the Class II market. As such, IGT respectfully requests that this section be deleted in its entirety.

Section 4.5.1.4(a), *Coin Acceptance Conditions*, page 48. The section as worded requires the software to ensure that the coins are directed to the "hopper or the cash box when the hopper is full." Diverting coins to the hopper in this state would only exacerbate the problem of a full hopper. As such, IGT respectfully requests that this section be reworded to state that coins must be diverted to "the cash box when the hopper is full."

Section 4.5.2.2(b and d), *Bill Acceptance*, page 48. These sub-sections appear to contain the same types of requirements as those contained in 4.5.1.4 above relating to coin acceptors. Similar to that section, IGT requests that this section be revised to state that bills must be diverted to the cash box when the hopper is full.

Section 4.5.4(6), *Voucher (Ticket) In*, page 50. This section requires that the voucher system notify the bingo terminal of the reason for a rejection of a voucher. IGT respectfully requests that this section be reworded as follows: "If the voucher is invalid, the voucher system will notify the Class II Player terminal that the voucher is invalid."

Section 4.5.5.1(1), *Cashless In/Out*, page 50. Please refer to the comments for Section 2.6 (1) above relating to communication protocol and encryption requirements. As indicated above, encryption is not the standard used by gaming jurisdictions throughout the United States and many forms of communication operate in a secure manner without the need for encryption. As such, IGT respectfully request that this language be revised to more generally provide for secure methods with regard to the communication of information.

Section 4.6.2.2(2), *Cancel Credit*, page 51. This section states that an option must be provided to allow a patron to exit a Cancel Credit state. Typically, the process to handle a Cancel Credit pay requires several steps and, for security and accounting purposes, operators generally do not prefer to allow a patron to cancel the process once it is initiated. As such, IGT respectfully requests that this section be reworded to state: "An option to exit the Cancel Credit state may be provided." This will allow flexibility from an operational standpoint.

Section 4.6.3.6, *Hopper Pay*, Page 53. This section requires the bingo terminal to support a hopper fill page. This type of technology is unreliable and only forces the operator to perform tedious and unnecessary labor. As such, IGT respectfully requests that this section be removed.

Section 4.6.4.1(2)a, *Ticket Voucher Printing, General*, page 54. Refer to the comments above for Section 3.13.5 regarding the requirement that ticket printers dispense two identical copies of each ticket printed.

Section 4.6.6, *Residual Credit Removal*, page 55. This section prohibits Residual Credit Removal, which is defined in the regulation as “a means of conducting a gaming transaction to convert the fractional amount to either the coin value or nothing.” IGT respectfully asks for clarification as to the Commission’s reasoning for prohibiting this type of functionality as IGT believes this should be allowed.

Section 4.7.3(1), *Game Screen Meters*, page 55. This section states that certain meters “must be simultaneously displayed in credits and in dollars and cents in a format which is clearly visible to the player and easily distinguished.” IGT believes that there is no reasonable basis for this requirement. In fact, it would be impossible to meet both criteria contained in this section and IGT believes that simultaneous dual displays of the same information might be confusing to the patron in that the patron may believe they are owed both amounts. As such, IGT respectfully requests that this section be reworded to state: “Meters concerning player entitlements (including Credit, Bet and Win meters) displayed on the game-screen must be displayed in a format which is clearly visible to the player and easily distinguished.”

Section 4.7.6.1, *Idle Mode Display*, page 57. This section requires that certain prior game information be available until the next game play. In bingo, the player is allowed to change their card before play commences. Once the card has been changed, it is critical that all prior game information is cleared from the game display to avoid disputes. As such, IGT respectfully requests that this wording be changed to state “view until the next play or until a players card is changed.”

Section 4.7.6.1, *Display Requirements with Non-zero Credit Meter*, page 57. Paragraph 4 of this subsection states that the total number of credits that would be wagered on the next play should be displayed. IGT requests clarification as to how this information would be available prior to the play of a game.

Section 4.7.6.2, *Display Requirements Following Hopper Collect*, page 57. This section specifically defines how hopper payout information should be displayed. These requirements are tedious and cumbersome and fail to provide any value to the operator or the player. Instead, IGT recommends that this section contain a general note as to what information is required to be displayed. This will allow operators and manufacturers the flexibility to display information in a fashion that is most compatible with their game operation.

Section 4.7.6.3, *Display Requirements Following Cancel Credit*, page 57. This section specifically defines how cancelled credit information should be displayed. Similar to These requirements are burdensome and provide no value to the operator or player. As such IGT

respectfully requests that this section be eliminated and replaced with a general note as to what information needs to be displayed. This will allow manufacturers the flexibility to display information in a fashion that is most compatible with their game operation.

Section 4.14, *Multiple Games*, page 64. This section indicates that the possibility of multiple game per one device has not yet been addressed. This section should authorize multi-games as there is nothing specific to the game of bingo that would prohibit them.

Section 4.15.2.2(1), *Progressive Jackpots, Communication With Progressive System*, page 64. IGT respectfully requests clarification as to the meaning and intent of this section as its purpose is unclear.

Section 4.15.2.3, *Progressive Jackpots, Modification of Progressive Jackpot Parameters*, page 64. IGT respectfully requests clarification as to the meaning and intent of this section as it's purpose is unclear.

Section 4.16.2(2)b, *Actions Upon Events*, page 65. Please see the comments for Section 2.2.2 above as these apply to this section, as well.

Section 4.16.3(3), *Actions on Clearance of a Fault Event*, page 65. Please see the comments for Section 2.2.2 above as these apply to this section, as well.

Section 4.16.4, *Faults to be Treated As Events*, page 66. The sub-section for printer paper low requires the game to lock up to avoid running out of paper. Since the Bingo Terminals currently in the field are able to continue play after paper has run out, IGT would suggest that this should still be possible under these regulations. As such, IGT respectfully requests that this section be modified accordingly.

Section 4.16.6.2(4), *Bill Acceptor Faults*, page 69. Please see the comments for Section 2.2.2 above as these apply to this section, as well.

Section 4.16.7, *Non-Fault Class II Player Device Events*, page 70. This section seems to imply that stand alone progressive awards are allowed. IGT is unclear as to the intent and purpose of this section as it would appear to conflict with language in previous sections. As such, IGT respectfully requests clarification as to the meaning of this section.

Section 4.16.8(3), *Notification of Faults*, page 70. This sub-section requires that Class II player devices become "user friendly" in situation requiring human interaction. Please note that game manufacturers should provide operation manuals that would provide guidance and assistance for training purpose and it is believed that such manuals are sufficient in instances requiring human interaction.

Section 6.6, *Encryption and Hashing*, page 82. Please see the comments for Section 2.6 (1) above as these apply to this section, as well.

Section 7.1, *Artwork, General*, page 85. Paragraph 20 of this section provides that "artwork graphics shall not be in any manner or form indecent or offensive." While IGT understands the purpose behind this rule, regulations such as this can be subjective in nature and it is unclear upon which these types of standards will be judged. As such, IGT requests that this rule be removed from the technical standards.

Section 7.2(9)a, *Artwork, Bingo*, page 86. Please see the comments for Section 4.7.6.1 above.

Section 9.1.2(2)a, *Systems to be Interfaced*, page 88. While we appreciate that SAS 6.01 is pointed out as a suitable protocol for Class II gaming, IGT would like to respectfully point out that SAS is not encrypted. We point this out in furtherance of our other points set forth above which indicate how unnecessary encryption is for Class II gaming.

Section 9.3.5(1)c, *Fault Conditions*, page 96. Please see the comments for Section 2.2.2 above.

Section 9.5.3(2), *Mathematics*, page 102 – IGT is unclear as to what a mathematical treatise incorporates. While we are willing to provide par sheets for a test lab to review, we are unwilling to divulge the exact details as to how we develop our bingo patterns. This information is confidential, and considered to be a trade secret. As such, IGT request that this requirement be reconsidered by the Commission.

I hope this information is helpful to the Commission during the rule-making process. Please feel free to contact me at (702) 896-8755 or John Chamberlain at (775) 448-1605 if you have any questions or need additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan Carletta", with a stylized flourish at the end.

Susan Carletta
Regulatory Compliance Manager



VIA FEDERAL EXPRESS

November 29, 2004

Philip N. Hogen, Chairman
National Indian Gaming Commission
1441 L St., N.W.
Suite 9100
Washington, D.C. 20005

Dear Chairman Hogen:

As you know, IGT previously provided information to the National Indian Gaming Commission (Commission) in connection with the Commission's efforts to establish technical standards and regulations for Class II gaming. By letter dated November 22, 2004, IGT submitted extensive comments relating to the technical standards portion of the Commission's draft regulations. The purpose of this letter is to provide additional comments on the Classification Standards of the Commission's draft regulations.

As a general comment, IGT observes that several of the provisions contained in the draft regulations focus heavily on legal aspects of Class II gaming. It is important to note that case law over the past ten years has addressed and resolved several issues in the Class II arena. This case law has been overwhelmingly favorable to the tribes. As such, IGT believes that the Commission should not take a different approach from the decisions established by case law and should in no way overturn interpretations that have already been addressed and resolved by the courts. Tribes and vendors have invested substantially in reliance on earlier regulations, court decisions, and Commission guidance and these investments are vulnerable as a result of the uncertainty by the current rulemaking.

IGT recognizes the importance of the Commission's responsibility to distinguish Class II games from those used in Class III gaming. Fortunately, many features of today's technologic aids used in the play of bingo differentiate themselves from Class III devices. First, the game being played is bingo – cards are utilized, numbers are covered, and every game must have a winner. This is not how Class III gaming devices operate. In addition, bingo terminals must be linked so that players are playing against each other in a common bingo game. Unless linked to the system and without the participation of at least two players, the individual bingo terminals are incapable of play. It is therefore impossible for a player to play against a machine rather than with or against other players. This clearly distinguishes the game play from operation of Class III gaming devices. Also notable is the fact that in the game itself, all elements of chance occur outside the terminals. All players utilize a shared ball draw. Lastly, Class II bingo games are not banked games – the house is not a participant in the game and the house cannot win the game.

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Below please find IGT's comments on specific sections of the Classification Standards of the Commission's draft regulations.

Different Interim Patterns Are Permissible Within A Common Game

The Third Draft regulations contain language that prohibits players in the same game from competing for different patterns and prizes. Throughout the informal rule-making process, IGT has submitted extensive information to the Commission regarding interim patterns. IGT believes that the interim patterns and prizes remain a part of the larger game – a game in which players, playing with cards bearing numbers, cover corresponding numbers as they are drawn, and are awarded prizes based on covering pre-determined patterns. Regardless of the game's interim events, players continue to compete within the “game,” and the “game” is still *won* by the first player to cover the game-winning pattern. Because the statutory requirements of “bingo” continue to be satisfied, IGT believes that interim patterns and prizes do not cause the game to fall outside the definition of bingo.

Courts and Commission precedent permit interim and/or consolation patterns and prizes in a game of bingo, and their presence has no material affect on the game's status as a Class II game. In the *MegaMania* cases, the courts held that MegaMania – including its interim game, CornerMania – is a Class II game.¹ Relevant to the discussion at hand is the fact that, in Megamania, the interim portion of the game is won differently from the larger overall game. In MegaMania, once the game-winning pattern is achieved, no one else can achieve this same pattern and win. By contrast, multiple players can achieve the same CornerMania pattern (two, three, or four corners) at various times during the game and win an interim prize. The fact that one player achieves a corners pattern and “wins” is meaningless to the other players – all players obtaining a predetermined pattern receive a prize.

In reviewing the differing attributes of the interim and game-winning portions of the game, the courts rejected arguments that CornerMania transformed the overall game classification from II to III. In its analysis, the Ninth Circuit Court of Appeals stressed that an evaluation of whether MegaMania constituted the game of bingo required examination of the game “*as a whole*,” and not of its constituent components.² As such, IGT believes that the appropriate focus of a game classification analysis is whether the game “as a whole” meets the three statutory requirements of bingo.

The Ninth Circuit's analysis noted that CornerMania includes two levels of competition. The first occurs when no corners pattern has been achieved, yet the straight-line, game-winning pattern has been won. Then, players are competing to be the first to achieve a corners pattern and claim the associated prize. The second level of competition occurs where one corners prize has been won, yet the straight-line pattern has not. In that case, players are competing to win additional corners prizes before the game-winning pattern is won.

¹ See *United States v. 103 Electronic Gaming Devices*, 223 F. 3d 1091; *United States v. 162 Megamania Gambling Devices*, 231 F. 3d 713.

² 223 F. 3d at 1098.

The Ninth Circuit further explained that, if CornerMania were “a free-standing game,” the fact that the game permitted multiple winners of interim prizes might be relevant, but because it cannot be played without playing the entire game – the game of MegaMania – that feature did not alter the game’s classification.³ The Tenth Circuit followed suit, adding that CornerMania is merely an “interim part” of a larger game.⁴

Consequently, as to the interim events in a Class II game, the courts do not require competition for a singular prize, barring further winners. Nor so the courts require players to simultaneously match patterns in the hope of a tie. Instead, the courts held that interim patterns and prizes may remain available as players participate in the overall game, regardless of the number of times those interim patterns may be won.

In addition to finding that CornerMania does not disqualify MegaMania from the statutory definition of “bingo,” the court characterized the “game” in question to be the *entire game* – “the game of MegaMania.” While other “interim parts” may be included, the “game” should be defined as nothing less than the portion being played for the straight-line bingo, or the applicable game-winning pattern.

The judicial acceptance of varying features within the interim portions of the game is significant, particularly the ability of players to win multiple interim prizes at various stages of the game without impairing other’s ability to win. The court’s recognition of multiple levels of competition within a Class II game of bingo is echoed by the Commission’s intent of ensuring that players “play with or against each other rather than with or against a machine.”⁵ Even where a common game contains different *interim* patterns, players continue to play “with or against each other” – players play *with* each other for interim patterns, and *against* each other for the game-winning pattern. Given that one player’s achievement of an interim pattern is irrelevant to all other players, so too is the equivalent availability of these interim patterns.

Broadening Participation Is Not Required

Section 3(a)(iv) would require that a linked system wait for either two seconds or six players before a game may begin. IGT strongly discourages such a requirement, first because it is without legal basis, and second, because IGT believes it could materially impair the viability of Class II gaming.

If the Commission’s rationale behind such a requirement is an attempt to broaden participation in a common game, that goal is both misguided and, likely, the attempt is self-defeating. First, “broadening participation” is *not* a requirement of all technologic aids. That equipment broadens participation levels in a common game is merely one factor indicating that the machine is a technologic aid, rather than a required element. This view that was recently upheld by the courts and IGT believes that the Commission should not impose requirements further restricting game

³ 223 F. 3d at 1100-1101.

⁴ 231 F.3d 713, 721.

⁵ 25 CFR §502.8.

play already sanctioned by case law.⁶ Second, the reality of the operation of Class II games compels the conclusion that the “two second/six player” requirement would not “broaden participation,” but more likely, extinguish it, particularly in sparsely attended facilities, or at times of minimal play. By imposing such significant delays on the beginning of each game play, the proposed regulations would harshly create the broadest distinction between Class II and Class III play. Class III would be functioning and profitable for those tribes fortunate enough to have compacts while Class II would be moribund.

The true purpose for fostering broadened participation is to ensure that players play with or against each other rather than with or against a machine. So long as that more fundamental purpose is satisfied, there is no reason to impose a secondary requirement (of delays or artificial player minimums). The intent of ensuring that players are not playing alone, against a machine, is satisfied by the involvement of two (2) players. A bingo game is no less bingo if only two players are participating. Requiring more than two (2) players in a common game is unnecessary.

Moreover, increasing the number of participants in a common game is only one way in which participation can be broadened. A game’s participation levels can also be increased by allowing players at different buy-in levels to compete against each other and by linking together multi-denomination games. Utilizing a variety of game themes and entertaining displays makes games more entertaining, also attracting additional players, who may then be grouped into games with each other. A game’s classification should not turn on its satisfaction of one of many means of broadening participation, or more importantly, how it ensures that players are playing against each other, rather than a machine. Because the broadening of participation can take many forms, it is important that the totality of a game’s characteristics be examined in determining whether the electronic equipment utilized with a Class II game broadens participation levels in a common game.

Games May Include Different Denominations and Varying Buy-In Levels

Section 3(d)(i)(c) contains the following language:

“Each game must provide an equal chance of obtaining any winning pattern for each card played by an active player in the game. The probability of achieving any particular pre-designated winning pattern for a participating player in the game may not vary based on the amount wagered by that player, except that a minimum wager may be established as a condition of eligibility to win a progressive prize.”

⁶ 25 CFR §502.7(b)(1); See also 67 Fed. Reg. 41166, 41170 (June 17, 2002); *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019, *internal cites omitted* (10th Cir. 2003), cert. denied, March 1, 2004, (“In MegaMania, we held that the device at issue was a technologic aid in part because it broadened participation in the underlying game of bingo. We did not hold that broadening participation was a requirement, nor did we endorse any such categorical rule. Rather, like the subsequently published NIGC regulations, we identified the broadening of participation as a factor favoring a finding that a device is a Class II aid.”).

Although the intent of this section is somewhat unclear, it could be interpreted to prohibit the linking of games of different denomination and buy-in levels. It is IGT's understanding based on recent indications from the Commission that the Commission does not intend to prohibit the linking of games of different denomination and buy-in levels and that the prize value for successfully achieving interim patterns could be scaled based on the amount wagered. Based on these recent indications, IGT believes that any language that would prohibit such linking should be deleted.

Entertaining Game Displays

IGT applauds the Commission for deleting sections within the First Draft that would have prohibited using video representations of poker hands, simulated races, roulette, dice games, or mechanical drums or reels to display the outcome of a game. The courts have consistently held that appearance is irrelevant.⁷ Instead, the determining characteristics of the game are whether the underlying game is Class II, and whether any electronic equipment utilized to play the game is a technologic aid. The addition of an entertaining game display has no effect upon either of these inquiries, nor does it impact either the play of the game or its outcome. Because these factors are irrelevant to a game classification analysis, IGT agrees that these provisions were properly removed from the draft regulation.

Multiple Ball Releases Not Always Required

IGT also recommends removing all sections from the Third Draft that require two releases of balls before *any* prize may be won. Case precedent prevents application to interim or bonus patterns, a position the Commission has expressed in its advisory opinion process: that a bingo winning pattern cannot be won with only one release of balls. This interpretation should not apply to other types of patterns or prizes such as interim or secondary prizes.

For example, in MegaMania, players compete both for the game-winning pattern and for secondary prizes associated with a portion of the game called "CornerMania." In its examination of the MegaMania game, the Court of Appeals spent a great deal of time evaluating whether this particular feature removed the game from the statutory definition of bingo, and thus from the definition of class II gaming. The Court of Appeals held that CornerMania does not change MegaMania's status as a class II game.⁸

As described by the Court, CornerMania is played along with the primary game and is won by a player who covers two, three, or four corners on a card. Each game will have a winner of both the primary MegaMania game and the secondary CornerMania game. In the event the MegaMania game is won before CornerMania, balls continue to be released, three at a time, until the CornerMania game is won.

Because in the game of MegaMania, balls are released to the players three at a time, a player can potentially achieve a two or a three corner pattern with just one release of balls. As such, a

⁷ 231 F. 3d 713. See also *Diamond Game Enterprises v. Reno*, 230 F.3d 365 (D.C. Cir. 2000) and *Seneca Cayuga Tribe v. National Indian Gaming Commission*, 327 F.3d 1019, 1040 (10th Cir. 2003).

⁸ 231 F. 3d 713.

player might win the prize associated with CornerMania in the *first* release of balls. The court held that this potential CornerMania outcome does not convert MegaMania into a class III game.⁹ The court's reasoning compels the conclusion that multiple releases are not required in association with secondary or interim portions of a Class II game.

As such, sections of the draft regulation that require multiple ball releases in order to achieve *any* pattern should be revised to allow secondary and interim prizes to be won in one ball release.

Prize Amounts

Section 3(d)(i)(d) requires that all prizes other than progressives "be fixed in amount or established by formula and disclosed to all participating players in the game. Random or unpredictable prizes are not permitted." Additionally, Section 3(d)(ii)(c) provides that the game-winning prize be no less than 20% of the amount wagered and at least one cent.

IGT believes that prize amounts are marketing decisions that are beyond the scope of the Act and should be determined by the Tribe. Prize values have no bearing on the distinction between Class II and Class III games. Nothing in the statute, relevant regulations, or judicial precedent justifies imposing limitations upon prize amounts. As such, references that require a specific or minimum prize should be removed from the draft.

"Auto Daub" Is Acceptable

Section 3(e)(i) of the Third Draft identifies three manual actions that must be made by the player during each game, including minimum timing requirements for those actions. Furthermore, sections 3(e)(vii) and (xiv) detail the manner in which players must "daub." These sections would improperly prohibit the use of a technologic daub aid in connection with a Class II bingo game.

IGT recognizes the importance of distinguishing Class II devices from those reserved for Class III gaming, however, IGT believes that prohibiting an "auto-daub" type feature is not necessary to preserve this distinction. For the following reasons, IGT believes that this type of prohibition is imprudent and should be removed from the Third Draft.

As you know, both the courts and the Commission have found the act of electronic daubing to be an acceptable method by which players can cover numbers on their bingo card(s). The courts have said that the manner in which a player "covers" numbers is irrelevant. The statutory requirements are satisfied so long as numbers *are* covered when similarly numbered objects are drawn or electronically determined.¹⁰ IGT observes that nothing in IGRA prevents a game of bingo from employing a feature that assists a player in daubing. To the contrary, IGRA

⁹ *Id.*

¹⁰ 25 U.S.C. § 2703(7)(A)(i).

expressly permits the use of technologic aids in the play of a Class II game,¹¹ and we note further that the use of “agents” has also been upheld.¹²

The term “auto-daub” has been used to refer to a family of features whereby a player is aided in covering numbers on their card(s). In one version, the player has to manually elect to employ this assistance. In other versions, auto-daub is the default; it is always on and it aids the player without further prompting. When choosing to cover the numbers on their card using an aid such as auto-daub, players are in essence seeking assistance similar to that offered by devices known as “bingo minders.” These devices, in use nationwide at Indian and charitable bingo locations, monitor the game’s progression and automatically cover all matching numbers on each of the player’s cards. Input by the operator of the game (typically, the bingo caller), and not the player, causes the numbers on the player’s card(s) to be covered. After the player enters her identification number, no additional interaction is required between that player and the device; all additional occurrences can be fully automatic. A player using a bingo minder *holds* the device, which itself replaces a number of bingo cards and all daubing functions, but that player is permitted to watch (with varying attention) the progress of the game as numbers are called and daubed, and to benefit from the game outcome. The more complex electronic player station merely adds an entertaining display of game outcome to functions already carried out by the daubing of the bingo minder devices. The electronic player stations do not incorporate the ball draw; all elements of chance occur outside the device. The more sophisticated technological aids involve more equipment, perhaps, but not a fundamental change in function from the bingo minders.

In analyzing devices similar to these and finding them to be class II aids, the Commission also evaluated the use of “agents” in the play of a bingo game.¹³ The following Commission language is of particular relevance:

“IGRA contains no statutory prohibition on the use of agents to play the game of bingo. The bingo definition contained in IGRA requires only that the “holder of the card” cover the numbers. The “holder” is not defined. The holder in NIB is either the player or the player’s designated agent. Although the bingo definition in the NIGC’s regulations replaces the word “holder” with the word “player,” this is a distinction without a difference when the law of agency is applied to the analysis. It is a fundamental tenet of the law of agency that the acts of the agent are deemed to be the acts of the principal. When the agent plays the NIB card for the player, the act of playing the card is deemed to be the act of the player/principal. The legal effect is that the agent *is* the player. Therefore, the use of agents violates neither IGRA’s provision regarding the holder nor the NIGC’s regulations that discuss the player.”¹⁴

¹¹ *Id.*

¹² *National Indian Bingo*, NIGC Advisory Opinion, November 14, 2000.

¹³ *Id.* at 5.

¹⁴ *Id.*, internal citations omitted.

Auto-daub serves as the player's agent, with the acts of the agent deemed to be the acts of the player. It cannot play independent of the player, and it has no impact on the outcome of the game. Incorporating the benefits of a reader/dauber device into another Class II bingo game is merely the natural progression of changing technology, as well as the natural progression of daubing through means of an electronic player station.

Significantly, the incorporation of auto daub does not eliminate the statutory requirement that the holder of a card "cover numbers" when the numbers are drawn or electronically determined. Even when auto-daub is utilized, the sequencing of the game remains intact. The player, through use of an agent, does not perform the daubing function until *after* each release of balls, thereby satisfying the sequencing requirement in IGRA that the "holder . . . covers numbers or designations . . . when objects, similarly numbered or designated, are . . . electronically determined." IGT respectfully notes that maintaining proper game sequencing seems to be a more appropriate focus for the Commission's technical standards than limiting flexibility through the prohibition of legally sound game features.

Even with the addition of auto-daub, each of IGRA's requirements of "bingo" continue to be satisfied. In other words, the game continues to completely conform to the statutory requirements as one that is played for prizes with cards bearing numbers or other designations, in which the holder of the card covers these items when similar objects are drawn or electronically determined, and the game continues to be won by the first person who covers a designated pattern on their card. Auto-daub simply aids players in the playing of the game by enabling them, through use of agents, to daub each release of balls at the appropriate time during the game's natural progression.

In addition, the statutes and regulations of several jurisdictions that currently allow bingo games for charitable or nonprofit purposes have been reviewed. Several of these jurisdictions including Louisiana, Missouri, and Washington, allow the use of electronic bingo card dauber devices which are defined similarly in the various regulations. Throughout the various jurisdictions' regulations, the term is commonly defined as an electronic device used by a bingo player to monitor bingo cards purchased and to electronically mark a player's bingo cards. In accordance with the IGRA, Indian bingo operations should be allowed the full scope of Class II gaming permitted to others, and not burdened with restrictions not applicable at competing charitable bingo operations.

Testing and Certification of Class II Products

As a general comment, IGT notes that the draft regulations contain provisions that would allow for the Commission to object to a testing laboratory certification. In particular, the draft regulations allow for such an objection to occur within 60 days of the issuance of a laboratory report and that notification must be made by the laboratory and the vendor to any tribal gaming regulatory authority to which the certification has been provided and that the certification is no longer valid.

As you know, IGT conducts business in numerous jurisdictions and IGT is accustomed to obtaining game certification by independent testing laboratories in the various jurisdictions

where business is conducted. Gaming regulatory agencies adopt technical standards relating to gaming products and rely on the certifications issued by the testing laboratories based on those standards. The majority of gaming agencies rely on the certification and do not have any type of secondary "approval" process. IGT believes that a process that invalidates a certification after the placement of games could be costly for the tribes and the vendors and could hinder the economic viability of the Class II market. As such, IGT recommends that the Commission rely on test laboratories to certify games according to technical standards adopted by the Commission.

House Banking Games

The Commission currently defines a "house banking game" as one "that is played with the house as a participant in the game, where the house takes on all players, collects from all losers, and pays all winners, and the house can win."¹⁵ The Third Draft, however, seeks to create a new definition of house banking by asserting that games similar to bingo that utilize "a payout table or targeted retention ratio or return-to-player percentage" are "house banked and not eligible for a Class II determination." This position marks a sharp divergence not only from case law, but also from Commission precedent.

In an earlier game classification opinion, the Commission opined:

"Another issue for consideration is whether the payment of a house fee or commission to the tribal operator makes the game a house-banked game. House-banked games are defined as Class III games by regulations of the NIGC. See 25 C.F.R. §§502.4(a) and 502.11. Under the definition set forth in the applicable regulation, to constitute a house-banked game, the house must be able to "win." In a house-banked game, the house, which is the banker, competes against all players, collecting from losers and paying winners.

"In electronic Wild Ball Bingo, the house is not a participant in the game. In contrast to a game such as blackjack, in which the house plays a hand and the success of the house depends on the success of the players, Wild Ball Bingo merely collects a fee. The fact that a tribal gaming operation collects a percentage of each payment, as in Wild Ball Bingo, does not make the house a player. Moreover, "the mere fact that the house nets a percentage of the players' fees for playing certainly cannot define a 'house-banking' game." See *U.S. v. 103 Electronic Gambling Devices*, 223 F. 3d at 1099."¹⁶

In line with its previous determinations, the Commission should avoid interpreting "house banked" as something other than the way in which it is defined by its own definitions, and certainly should avoid applying a definition that conflicts with case law. Both the Ninth and Tenth Circuit Courts of Appeal have held that the fact that the house retains a percentage of the

¹⁵ 25 CFR §502.11.

¹⁶ *Wild Ball Bingo*, NIGC Advisory Opinion, March 27, 2001.

amount wagered does not make a bingo or similar to bingo game house banked as that term is defined by the Commission.¹⁷ Any potential misunderstanding of the term's meaning within the definition of "other games similar to bingo" is alleviated by simply applying the term as currently defined by the Commission. This approach also provides consistency with existing case law.

An alternate approach, however, would be to eliminate the requirement that a game similar to bingo cannot be house banked – an approach also with ample support. According to Congress, if a game is either bingo, pull tabs, lotto, punch boards, tip jars, instant bingo, or an other game similar to bingo, it is class II by definition.¹⁸ Whether any of these seven games are house banked is simply not relevant to their classification. By definition, they are class II games.

As reflected in the legislative history, the term "house banking" was intended to have a more narrow application. IGRA provides that class II games do not include "any banking *card* games, including baccarat, chemin de fer or blackjack."¹⁹ As the Senate Committee on Indian Affairs reported:

"Section (4)(8)(A)(ii) provides that certain card games are regulated as class II games, with the rest being set apart and defined as Class III games under section 4(9) and regulated pursuant to section 11(d). The distinction is between those games where players play against each other rather than the house and those games where players play against the house and the house acts as banker. The former games, such as those conducted by the Cabazon Band of Mission Indians, are also referred to as non-banking games, and are subject to the class II regulatory provisions pursuant to section 11(a)(2). Subparagraphs (1) and (II) are to be read in conjunction with sections 11(a)(2) and (b)(1)(A) to determine which particular card games are within the scope of class II. No additional restrictions are intended by these subparagraphs."²⁰

Thus, the "house banking" requirement was intended by Congress to distinguish between class II and class III *card* games, not the seven enumerated games it had already defined as class II. In hindsight, not only did the Commission's search for a quick fix conflict with Congressional intent, but by extending this requirement to "games similar to bingo," the Commission also imposed an erroneous limitation upon the scope of class II gaming.²¹

¹⁷ *U.S. v. 103 Electronic Gambling Devices*, 223 F. 3d at 1099; *U.S. v. 162 Megamania Gambling Devices*, 231 F.3d at 721.

¹⁸ 25 USC §2703(7)(A)(i).

¹⁹ 25 USC §2703(7)(B) (emphasis added).

²⁰ S.Rep. 100-466 at A-9.

²¹ "Some commenters pointed to the fact that the IGRA mentions banking games only with respect to card games and there only as they related to nonbanking card games. The Commission, however, finds the distinction between house banking games and other games useful in defining class III games. In the view of the Commission, house banking games are a subset of casino games that Congress intended to include in class III. Because the house banking game concept provides a simple test for implementing congressional intent the Commission adopted it. Therefore, the Commission rejected the suggestion that the concept of banking apply only to card games." 57 Fed. Reg. 12382, 12385 (April 9,1992).

It is also worth noting that the Commission's explanation here conflicts with its reasoning in other portions of that same preamble. As previously discussed, Congress had already provided that seven classes of enumerated games – including games similar to bingo – are class II games. The Commission recognized elsewhere in the preamble that requiring these games to meet a house banking test would have been inconsistent with IGRA's statutory scheme. As the Commission explained, "[t]he Commission has determined that whether or not a game is a house banking game or a stakeholder game is not relevant to the classification of games that Congress expressly placed in class II: Bingo, lotto, pull-tabs, instant bingo, and tip jars."²²

While the Commission neglected to include "other games similar to bingo" in this listing, it stands to reason that because IGRA precludes the use of house banking for the other enumerated class II games, it also precludes its use for this one. This reasoning is also in line with the character of the games included in this list. As opposed to the other specific games on the list, games similar to bingo are not simply one game, such as lotto or tip jars. Instead, games similar to bingo are simply just that – a group of other games that are *similar* to bingo. As the Commission noted, "the concept of house banking game is not relevant to games enumerated in the IGRA as class II games."²³ Because "games similar to bingo" are "games enumerated in the IGRA as class II," the "concept of house banking game is not relevant."

Technologic Aids, Electromechanical Facsimiles, and Slot Machines of Any Kind

IGT is troubled by repeated statements that, in essence, Class II technologic aids must be viewed narrowly because "slot machines of any kind" fall within the category of Class III gaming. As outlined below, IGT believes that such an implication has no place in a game classification analysis.

The Commission first attempted to clarify the distinction between technologic aids and electromechanical facsimiles, in definitions promulgated in 1992. "Electromechanical facsimile" was then defined to mean "any gambling device as defined in 15 USC 1171(a)(2) or (3)," a reference to the federal Gambling Devices Act, more commonly known as the Johnson Act. For the definition of Class III gaming, "slot machine" was specified to mean "[a]ny slot machines as defined in 15 USC 1171(a)(1). . .," – once again referencing the Johnson Act.²⁴ As a result, both an "electromechanical facsimile" and a "slot machine of any kind" were improperly defined by the Johnson Act's meaning of a "gambling device."²⁵

²² 57 Fed. Reg. 12382, 12388.

²³ *Id.*

²⁴ 25 CFR §502.4

²⁵ 15 USC §1171(a) provides:

"(a) The term 'gambling device' means—

"(1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

The Johnson Act, which predates IGRA by thirty years, prohibits the possession, use, sale, or transportation of “gambling devices” under a variety of circumstances.²⁶ In an effort to “anticipate the ingeniousness of gambling machine designers,”²⁷ its provisions are intentionally wide-ranging, and it has thus been held to cover a broad range of devices.²⁸ IGRA, in contrast, was designed to create a regulatory scheme for gaming activities on Indian lands, not for the prohibition of those activities. IGRA divides gaming into three “classes” and specifies varying prerequisites to the play of each. Whereas the Johnson Act was intended to determine whether something *is* a “gambling device,” IGRA was intended not to ban all such devices, but to establish the regulatory framework for their operation.²⁹

With time, linking the definition of “facsimile” with the Johnson Act proved to be unworkable.³⁰ The Federal courts consistently rejected the application of the Commission’s 1992 definitions. As the Commission observed, “[w]ithin the context of IGRA, there is no question as to ‘gambling’ per se – all Indian gaming is ‘gambling.’ Accordingly, determining whether the Johnson Act covers a particular device simply does not answer the question relevant to Indian gaming: whether the game is class II or class III.”³¹

Even more troublesome, including the Johnson Act in a game classification analysis under IGRA also produced nonsensical results. Bingo ball blowers, for example, fall within the Johnson Act definition of a “gambling device.” Read together with the Commission’s definition of facsimile, a bingo ball blower was transformed into Class III gaming – a result that Congress clearly did not intend. This inconsistency caused three United States Circuit Courts of Appeal to ignore these definitions, with one openly criticizing the Commission’s lack of guidance.³²

“(2) any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
“(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device, but which is not attached to any such machine or mechanical device as a constituent part.”

²⁶ 15 USC §1175(a).

²⁷ *Lion Manufacturing Corp. v. Kennedy*, 330 F.2d 833, 836-837 (D.C. Cir. 1964).

²⁸ See, e.g., *United States v. H.M. Branson Distrib. Co.*, 398 F.2d 929, 933 (6th Cir. 1968) (pinball machines with knock-off meters that can accumulate free games); *United States v. Two (2) Quarter Fall Machines*, 767 F. Supp. 153, 154 (E.D. Tenn. 1991) (machines where the fall of coins could deliver hanging coins into a pay-off chute); *United States v. 11 Star-Pack Cigarette Merchandiser Machines*, 248 F. Supp. 933, 934 (E.D. Pa. 1966) (an attachment on a vending machine that could deliver a free pack of cigarettes); *United States v. Wilson*, 475 F. 2d 108 (9th Cir. 1973) (a machine that sold store coupons and prize tickets in a prearranged order from a preprinted bundle even though the player could see the coupon or ticket he was buying).

²⁹ See 67 Fed. Reg. 41166, 41168 (“In other words, the ingenuity of gaming designers, which was designed to be constrained by the Johnson Act, is arguably intended to be given freer rein by IGRA in the context of class II gaming.”).

³⁰ 67 Fed. Reg. 41166, 41167-41168 (June 17, 2002).

³¹ 67 Fed. Reg. 41166, 41170.

³² *Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F. 3d 633 (D.C. Cir. 1994) (holding that the scope of gaming determination at issue in the case could be made by looking to the statute alone and without examining the Commission’s regulatory definitions); *Sycuan Band of Mission Indian v. Hoache*, 54 F. 3d 535, 542 (9th Cir. 1994) (resorting to the dictionary definition of facsimile as “an exact and detailed copy of something,”

As a result, in 2002, the Commission specifically renounced linking the definition of facsimile to the Johnson Act.³³ The Commission concluded that “[b]ecause of their inconsistent purposes, inclusion of the Johnson Act in a game classification analysis undermines the fundamental principles of IGRA.”³⁴ Importantly, this same reasoning and conclusion applies equally to any analysis involving “slot machines of any kind.” Any claim that a technologic aid to a Class II game is transformed into Class III gaming simply because the Johnson Act would suggest it to be a “slot machine,” should similarly fail.

As discussed above, both “electromechanical facsimiles” and “slot machines of any kind” are excluded from Class II gaming. Furthermore, both terms were originally defined by referencing the Johnson Act’s “gambling device” definition: “electromechanical facsimile,” by referencing subsections (a)(2) and (3), and “slot machine,” by referencing subsection (a)(1).

The courts held that Congress did not intend the Johnson Act to prohibit the use of technologic aids to Class II gaming.³⁵ Instead, a game classification analysis under IGRA should begin by determining whether the machine or device is a technologic aid to a Class II game. If so, the analysis is complete. There is no need to then evaluate whether the machine or device may also fall within the Johnson Act definition of a “gambling device.”³⁶ Because technologic aids to class II games, expressly authorized by the IGRA, are not within the reach of the Johnson Act, any claim that an aid is transformed into class III gaming simply because it may also be a Johnson Act game is no more than a return to the failed facsimile definition.³⁷ As such, the Commission should avoid any return to the notion that the Johnson Act should be included in a game classification analysis under IGRA.

rather than using the regulatory definition); *Diamond Game Enterprises v. Reno*, 230 F.3d 365, 369 (D.C. Cir. 2000) (“Boiled down to their essence, the regulations tell us little more than that a class II aid is something that is not a class III facsimile.”)

³³ 67 Fed. Reg. 41166, 41168 (June 17, 2002).

³⁴ 67 Fed. Reg. 41166, 41170 (“From the Commission’s perspective, the Johnson Act has proven remarkably troublesome as a starting point in a game classification analysis under IGRA.”).

³⁵ “Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a class II game, and is played with the use of an electronic aid.” *U.S. v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 715 (10th Cir. 2000). See also *U.S. v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1102 (9th Cir. 2000) (rejecting the notion that the Johnson Act extends to technologic aids to the play of bingo); *Diamond Game Enterprises v. Reno*, 230 F.3d 365 (D.C. Cir. 2000) (noting that class II aids permitted by IGRA do not run afoul of the Johnson Act); *United States v. Burns*, 725 F.Supp. 116, 124 (N.D.N.Y. 1989) (indicating that IGRA makes the Johnson Act inapplicable to class II gaming and therefore tribes may use “gambling devices” in the context of bingo); *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019, 1032 (10th Cir. 2003), cert. denied, March 1, 2004 (“Absent clear evidence to the contrary, we will not ascribe to Congress the intent both to carefully craft through IGRA this protection afforded to users of Class II technologic aids and to simultaneously eviscerate those protections by exposing users of Class II technologic aids to Johnson Act liability for the very conduct authorized by IGRA.”).

³⁶ *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019, 1035 (10th Cir. 2003), cert. denied, March 1, 2004.

³⁷ *Id.* at 1032 (“Accordingly, consistent with our holding in *MegaMania*, we hold that if a piece of equipment is a technologic aid to an IGRA Class II game, its use, sale, possession or transportation within Indian country is then necessarily not proscribed as a gambling device under the Johnson Act. If a piece of equipment is an IGRA Class II technologic aid, a court need not assess whether, independently of IGRA, that piece of equipment is a gambling device proscribed by the Johnson Act.”)

Philip N. Hogen, Chairman

November 29, 2004

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I hope this information is helpful to the Commission during the rule-making process. IGT plans to continue to be involved during this informal process and as the Commission enters the formal rule-making phase. Please feel free to contact me at (702) 896-8755 if you have any questions or would like additional information. Thanks you, in advance, for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan Carletta", with a stylized flourish at the end.

Susan Carletta

Regulatory Compliance Manager

Exhibit A

THE PROBLEMS WITH COMMON PAYS, COMMON PATTERNS, AND COMMON PROBABILITIES

As the NIGC has noted on many occasions, most recently in their proposed rule - 25 CFR Parts 502 and 546, Classification Standards; Class II Gaming; Bingo, Lotto, et al.; that “In the Commission’s view, bingo, lotto and “other games similar to bingo” are games where broad participation is favored...” However, in the current version of the draft regulations promulgated by the NIGC, two sections stand out as problematic in their requirement for common pays, common patterns, and common probabilities:

Section 546.6(b) – In order for players to participate in a common game and to meet the requirements for the minimum number of players, each player must be eligible to compete for all winning patterns in the game. A game may offer players the opportunity to play at different entry wagers, and the prizes in the game may be increased, or a progressive prize offered, based on a higher entry wager, so long as all prizes are based on achieving pre-designated winning patterns common to all players.

Section 546.6(l) – Each game must provide an equal chance of obtaining any winning pattern for each card played by an active player in the game. The probability of achieving any particular pre-designated winning pattern for a participating player in the game may not vary based on the amount wagered by that player.

While on the surface these requirements do not sound onerous, they serve to limit rather than broaden participation, critically impact game play, and decrease flexibility for the tribal operator. Below are several areas of concern.

FLEXIBLE PAYBACK PERCENTAGES

Key to the success of all casino operations is the ability to leverage machines for maximum benefit based on location, popularity, and the amount wagered. By requiring only those games using the same common pays, patterns, and probabilities to play together, machines on the floor using different payback percentages will not be available for common play. This will reduce the potential field of players eligible to be in a common game.

For example, if a casino has 180 Class II machines, and the operator runs three different percentages (which is typical on many existing Class II operations) distributed evenly in groups over the floor, then the operator will in effect create three different 60 machine sub-groups on his floor. Therefore, players playing at the lowest percentage will not be able to play against players in the higher two percentages, which will, in effect, serve to reduce participation, not increase it. Also, since the machines are in smaller sub-groups, a player will have more difficulty in finding players to play against, and thus fewer games will be played.

Exhibit A

High %	60 machines
Med %	60 machines
Low %	60 machines

FLEXIBLE THEME SELECTION

In addition to the importance of flexible payback percentages, flexibility in selecting game themes is critical to the success of all casino operations. Some players prefer smaller but more frequent payouts, while others prefer larger but less frequent payouts, and finally some players are in between these two groups. The same player may choose games out of each group based on their preference that day, the amount of time that they wish to play, as well as other factors. As such, operators need to give their players choices to ensure that each player is able to find a machine that they are comfortable with. In just the same way as common pays, patterns, and probabilities segment the floor with multiple payback percentages, they segment the floor with multiple hit frequencies.

As in the previous example, if a casino has 180 Class II machines, and the operator runs three different volatilities (which are typical on many existing Class II operations) distributed evenly in groups over the floor, then the operator will in effect create three different 60 machine sub-groups on the floor. Therefore, players playing at the lowest volatility payable will not be able to play against players utilizing the higher volatility paytables. Again this serves to reduce participation, not increase it. Also, since the machines are in sixty machine sub-groups, players will have more difficulty in finding players to play against, and thus fewer games will be played.

60 machines	High frequency
60 machines	Medium frequency
60 machines	Low frequency

COMPOUNDING THE PROBLEM

The need for both flexible theme selection and flexible payback percentages is essential. Unfortunately, when these two issues are looked at together in relation to the proposed standards, the problem compounds. Today, operators have a genuine need to mix differing volatilities with differing payback percentages. This will serve to break the shrinking machine groups into even smaller segments.

Again, using the previous example, if a casino has 180 Class II machines, and the operator runs three different volatilities (which is typical on many existing Class II operations), and three different percentages distributed evenly in groups over the floor, then the operator will in effect create nine different 20 machine sub-groups on the floor.

Exhibit A

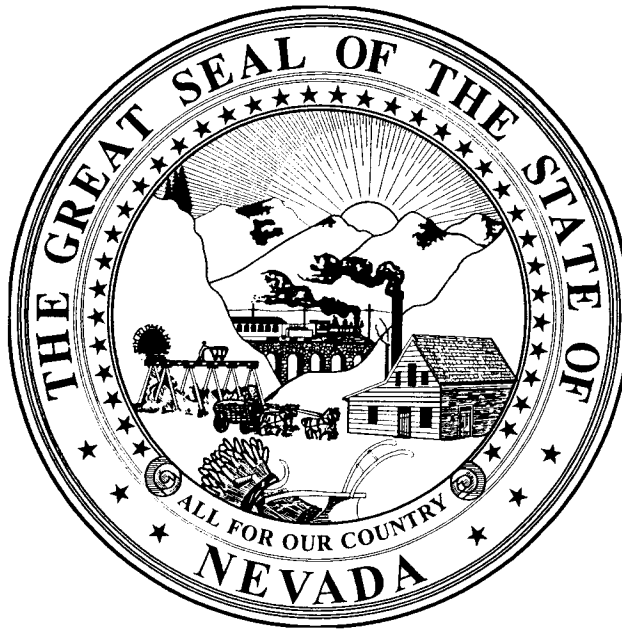
Therefore, players playing the lowest volatility and percentage payable will not be able to play against players with other paytables. Now participation is limited to only 20 player groups on the floor. The player's ability to consistently play in a game will be greatly impeded. Revenue will surely drop as players will not be able to play games and game play may be slowed. Potentially, due to growing dissatisfaction with the products, they will stop playing altogether.

Of course, some would suggest that this problem could be overcome by offering only one percentage to the player, and offering only one type of theme to the player. This notion is not a good one, as the lack of variety and pricing flexibility will reduce revenue as well.

CONCLUSION

It has been stated many times by NIGC that one of the criterion for technologic aids to the play of Class II bingo is that the aid broaden participation. These proposed rules do just the opposite, as they serve to reduce the amount of players who can participate in a common game. Further, these sections strip tribal bingo operators of the flexibility currently exercised by competing commercial bingo operators. These rules as written have the potential to destroy the viability of Class II machines in the market place.

	High frequency	Medium frequency	Low frequency
High %	20	20	20
Med %	20	20	20
Low %	20	20	20



NEW GAMING DEVICE SUBMISSION PACKAGE

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NEW GAMING DEVICE SUBMISSION

(In Accordance with Regulation 14.020 through 14.100)

Any manufacturer desiring to obtain approval of a new gaming device must have a current license from the State Gaming Control Board (GCB) to act as a manufacturer of gaming devices. A manufacturer may seek licensing through the State GCB Applicant Services.

A licensed manufacturer requesting approval for a new gaming device must have established a new game financial account balance of at least \$10,000 with the Board. The approval process, as set forth in Regulation 14, consists of a Lab evaluation, minimum 60 day field trial, and Board and Commission review and approval. This process requires 8 months minimum to complete. Laboratory fees for the test and evaluation of a new gaming device are assessed at the rate of \$120 per hour. Expenses for Lab personnel traveling to new game approval hearings and court recorder charges relating to those device hearings are prorated against the accounts of the manufacturers represented at the hearings.

At no time during the approval process shall the manufacturer of the new gaming device collect any revenue for operation of the device. During the field trial the location hosting the trial will collect 100% of any generated revenue.

Upon request, a fully functioning production type model of the gaming device must be delivered to the GCB Electronic Services Division which is located at 555 E. Washington Avenue, Suite 1800, Las Vegas, Nevada, 89101. The following materials must be submitted prior to initiation of the approval process.

Submitted Material

Each submission must include, in addition to other items or information as the chairman may require:

- 1) The manufacturers name, address, phone number and FAX number;
- 2) A list of the persons authorized to communicate with the Board or the Laboratory relative to a new gaming device. Identify each person's organizational position;
- 3) A complete, comprehensive, and technically accurate compliance report which describes and explains in both technical and lay language of the manner in which the device operates, and satisfies all the requirements of the Technical Standards for Gaming Devices and Regulation 14;
- 4) Completed Hardware and Software data-entry modification request sheets;

- 5) Completed New Gaming Device Operator Selectable Options checklist;
- 6) Completed New Gaming Device Subcontractor checklist;
- 7) A statement under penalty of perjury that, to the best of the manufacturer's knowledge, the gaming device meets the standards of 14.040;
- 8) A copy of all executable software, including data and graphic information, and a copy of all source code for programs that cannot be reasonably demonstrated to have any use other than in a gaming device, submitted on electronically readable, unalterable media;
- 9) A copy of all graphical images displayed on the gaming device including, but not limited to, reel strips, rules, instructions and paytables;
- 10) Any hardware and software necessary to reproduce programming; and
- 11) A letter from a licensee agreeing to conduct a field trial of the new gaming device at their location.

Applicable Documents

- 1) Regulation 14. Governs the licensing of manufacturers and distributors; to provide for the manner of licensing manufacturers and distributors, approving of gaming devices, associated equipment, and new games; to provide for reporting distribution of gaming devices.
- 2) Technical Standards for Gaming Devices. Outlines performance requirements for gaming devices.
- 3) Device compliance report outline. This document details the required compliance with applicable regulation and technical standards.
- 4) General instructions for requesting gaming device modifications.

Applicable Forms

- 1) Hardware and Software data-entry modification request sheets.
- 2) New Gaming Device Operator Selectable Options checklist.
- 3) New Gaming Device Subcontractor checklist.

OUTLINE FOR A NEW GAMING DEVICE COMPLIANCE REPORT

Device Description:

Describe the new game in sufficient detail for a lab person to understand. Include the sequence of events for game play, coin-in limits, denomination, credit usage, and describe the universe of total events the game is based upon (52 cards, four 64 stop reel strips, etc.). Is the winner payout based upon the concept of coin multiplier, buy-a-pay, multiple line, or some other system? If the element of player skill is involved, can its effect on the game payback percentage be calculated or estimated?

Unique Characteristics:

Describe any unique or unusual characteristics of this device. How is this device different in physical design or in its manner of play from previously approved gaming device.

Technical Standards and Regulation 14:

Include a complete description of how the device meets all of the Technical Standards for Gaming Devices and Regulation 14;

Technical Standard [1.020] Electrical Interface Immunity

Does the conventional gaming device or client exhibit total immunity to electrostatic discharges (ESD) of up to 20, 000 volts on surfaces exposed to players?

Describe any interruption, disruption, loss of information or component failure that may occur due to ESD of up to 27,000 volts.

Describe the effects of power loss and recovery as well as the effects of voltage spikes and noise on the AC power supply lines.

Explain why the random number generator (RNG) and the random selection process are impervious to externally generated interference. (ESD, electro-magnetic, radio frequency, associated equipment communications).

Technical Standard [1.030] Coin Acceptor and Receiver

Describe the coin-in handler and how it detects slugging, stringing, spooning, and other cheating methods.

What physical devices are used to detect inserted coins (LEDs, switches, etc.)? Upon what basis does the receiver determine the validity of an inserted coin (size, weight, thickness, metallic content, etc.)?

Describe the error codes and device response to COIN-IN JAM, INAPPROPRIATE COIN-IN, and REVERSE DIRECTION COIN-IN errors.

What denomination wagers can be placed? How is the denomination set? What are the coin-in limits? Does the device allow more than \$3000 to be accepted via the coin acceptor before a wager is made?

Technical Standard [1.035] Change voucher or coupons

Does the device or client accept vouchers that are not evenly divisible by or is less than its accounting or base denomination? If so, is a change voucher or coupon issued immediately or is the entire amount placed on the credits meter?

If a change voucher or coupon is to be generated when a voucher or coupon is inserted will the device reject the voucher or coupon if the printer is not functioning?

Technical Standard [1.040] Hopper

Describe the coin-out detection device (LEDs, switches, etc.). What steps are taken to eliminate cheating of the detection device?

Describe the error codes and device response to COIN-OUT JAM, EXTRA COINS PAID OUT, HOPPER RUNAWAY and HOPPER EMPTY.

Describe the hopper payout limits.

Describe methods available to determine if the hopper is full, and what activates the drop diverter (weight switch, coin level sensor, etc.)

Technical Standard [1.045] Printers

If a wagering instrument printer is to be utilized, does the printer detect low paper, paper out, presentation error, printer failure, and paper jam conditions?

Is the printer mounted inside a lockable area of the gaming device?

Technical Standard [1.050] Physical Security

Describe the methods used to prevent and to identify illegal entry into the device. Include the codes generated and device response to DOOR OPENING, DOOR CLOSING, DROP DOOR OPEN, etc.

Describe what critical game circuitry has been mounted in secure enclosures. How can an end user install locking mechanisms on the enclosures

For a system supported or system based game is the server or system component designed to be installed and operate from a secure area where access can be limited to authorized personnel?

Describe the logging device used to record all logical access to the system supported or system based game. How does the device log access by time date and the identity of the individual accessing the secure area? How does the logger guarantee that recorded transactions are kept for 90 days?

Are the same the system supported or system based game logs stored on the server portion of the system supported game or the system based game? If the logs are different please describe.

Technical Standard [1.060] Communication with Associated Equipment

Describe all communications between the game and outside equipment (progressive controller, data gathering system, etc.). Explain why good or erroneous signals from associated equipment can not adversely effect the operation of the gaming device.

Identify selectable jackpot options (single, multiple, progressive, etc.).

Identify all jackpot signals that are sent to progressive jackpot controllers. Describe how they go through a combination of at least 8 time and magnitude logic changes to indicate that a legitimate jackpot has been hit by the gaming device.

Is the system based or system supported gaming device capable of communicating with other external equipment or programs? Please describe any supported protocols and/or interfaces used to facilitate the communication. Also describe how they prohibit the external connection from direct access to the internal components, software or data of the system based or system supported gaming device,

Technical Standard [1.062] Communication between Client or Conventional Gaming Device and Servers or System Portions of a Gaming Device

Describe the method used to securely link the client or clients to the server and describe how this method will eliminate the possibility of non-authorized clients from receiving software downloads.

Describe the encryption method used when communicating player input, game outcome, financial transactions, and game recall between the client and the server.

Technical Standard [1.066] Remote access to gaming devices

Describe the intended method for remote access to the gaming device where "remote access" is defined as a connection made to the gaming device from a system or network that the gaming device operated from or on (i.e. the device is located and operated at operator's A property, but property B has access to the gaming device.)

Describe the intended method for remote access to the gaming device where "remote access" is defined as an external connection to the gaming device from a system or network that the gaming device does not operate from or on (i.e. manufacturer network to operator network where the gaming device resides). This type of access is typically limited to program updates, etc.

Describe the process that is used to download software through remote access. Is the software that is downloaded initially stored in a separate area or partition of memory?

How is downloaded software authenticated prior to performing any operation on the software?

All remote access should be logged by the remote logger. If the logger is not operational is remote access denied?

Technical Standard [1.070] Error Conditions

Describe the error code and the response of the device to each of the following error types: Power reset, door opened, door closed, inappropriate coin in, coin in error, coin out error, hopper empty, hopper runaway, low RAM battery, print failure, printer mechanism print jam, printer mechanism paper out, program error, reel spin error, removal of control program storage media, uncorrectable RAM error.

What other types of errors are detected and displayed by the device?

What steps are required to reset each of the above listed errors? Which errors are self correcting? Which require attendant intervention? Describe any data losses or changes due to an error reset.

Include a copy of the device error codes that are to be affixed inside the gaming device. Describe attendant activated external game controls (key switch, door switch, etc.) and identify their functions. This is only required if error codes are not self-explanatory.

List attendant activated internal game controls (switches, push buttons, etc.) and identify their functions.

Technical Standard [1.080] Control Program Requirements

This standard applies to standalone conventional gaming devices and conventional gaming devices and clients that operate in conjunction with a system based or system supported gaming device.

Fully describe the method used by the device to verify the control programs and date resident on conventional ROM devices. Identify the game states or specific times during game play when they are invoked. Include a copy of the source code of the routine that checks the control program for corruption. If these control programs are loaded into and operate out of RAM does the program that loads the RAM reside on and operate from a conventional ROM device?

Are all unused portions of conventional ROM devices which contain control programs set to zero?

If control programs are stored on media other than a conventional memory device describe the method used to verify the contents of the media prior to loading and executing any programs stored on the media. Does the program that loads RAM from this media reside on and operate from a conventional ROM device?

Describe the mechanism used to test unused or unallocated areas of any alterable storage media for unintended programs or data and what occurs if unexpected data or programs exist.

Describe the mechanism for keeping a record anytime a control program component is added, removed, or altered on any alterable storage media. The record must contain a minimum of the last 10 transactions.

Describe the mechanism for validating all program components which reside on non conventional media on demand via a communication port and protocol.

If control programs are executing from volatile RAM describe the method that is used to verify that these programs are authentic copies of the programs loaded from either the conventional ROM device or media. How often does this authentication occur?

Does the device allow for the adding, removing or alteration of any control program components through a data communication facility?

Describe in detail the method used to check for corruption of information stored in non-volatile RAM that relates to play and final outcome of the PRIOR GAME OUTCOMES, RANDOM NUMBER GENERATOR OUTCOME, CREDITS AVAILABLE FOR PLAY, ERROR STATES AND JACKPOT STATES. Identify the game state or specific time during game play when the RAM integrity test is invoked. Include a copy of the source code of the routine that checks the game for corruption. What is the response of the gaming device when RAM corruption is detected?

The present game and nine prior games must be available for recall, showing all critical game information and how it relates to the game that was played. Sufficient information should be stored to resolve any uncertainty in patron disputes over how the present and past specific games are actually played and the end results of game play. This information should include what wagers were placed, what cards were dealt, what was held, how many credits existed, what payments were made, what is owed, what were the winning combinations, etc. Games with a variable number of intermediate steps per game may satisfy this requirement by providing the capability to display the last 50 play steps.

Identify all conventional (EPROM) memory devices by label, size, type, board location, and hex address range as seen by the microprocessor.

Identify all non-conventional (CD-ROM, Hard drive, etc.) memory devices by size, type, and location.

Identify all RAM memory by size, type, board location and hex address range as seen by the microprocessor. Describe which RAM chips are non-volatile or battery-backed. Describe the circuitry and components used to maintain the non-volatile RAM (batteries, EEPROM, etc.).

Identify all CPU's by type, usage, clock frequency, and board location. If any ROM memory is contained in a CPU chip, describe its address range and its function.

Does the gaming device have the capacity to display a complete transaction history for the most recent 35 transactions with a cashless wagering system?

Technical Standard [1.084] Control Program Requirements for System Supported Games

Describe the method of verification of all control programs contained on the server or system portion. Does this occur at least once every 24 hour period? Is a report available that list the details of each verification?

Describe how the required secondary verification method is initiated. Can the verification be initiated through a secure interface port or connection?

What steps are taken to ensure that multiple people are required to be granted system administrator access?

Are all software changes on the server logged on the server and on a remote logging device? How do the various components guarantee that recorded transactions are kept for 90 days?

Are all software changes on the device or client logged on the device or client, the server, and on the remote logging device? How do the various components guarantee that recorded transactions are kept for 90 days?

Describe how the devices or clients authenticate downloaded software. How is authentication information communicated to the server? Is the server capable of disabling the device or client?

Technical Standard [1.086] Control Program Requirements for System Based Games

Describe the method of verification of all control programs contained on the server or system portion. Does this occur at least once every 24 hour period? Is a report available that list the details of each verification?

Describe how the required secondary verification method is initiated. Can the verification be initiated through a secure interface port or connection?

What steps are taken to ensure that multiple people are required to be granted system administrator access?

Are all software changes on the server logged on the server and on a remote logging device? How do the various components guarantee that recorded transactions are kept for 90 days?

Are all software changes on the device or client logged on the device or client, the server, and on the remote logging device? How do the various components guarantee that recorded transactions are kept for 90 days?

Describe how the devices or clients authenticate downloaded software. How is authentication information communicated to the server? Is the server capable of disabling the device or client?

Can game recall be initiated at the server for any of the client stations? Is the server capable of displaying the transaction history for any of the client stations?

Technical Standard [1.090] Bonus or Extended Game Features

Describe any submitted gaming device theme(s) which include a bonus or extended game feature. Does the feature auto-initiate or is the initiation patron activated?

Technical Standard [1.100] Reel strips

If the device has physical reel strips does the spacing of the symbols comply with the Technical Standard?

Technical Standard [1.110] Safety

What manufacturing standards and practices have been followed to assure that players will not be subjected to electrical, mechanical or fire hazards?

How is the device electrically fused or fault protected? How much AC and DC leakage current flows when the AC cord ground wire is disconnected?

Technical Standard [1.120] System Based Game Configuration

Include an expected network topology diagram including all networking hardware.

Identify the single points of failure in the intended implementation of the system based game.

Describe the recommended means for an operator to correct any single points of failure (i.e. maintaining an extra hardware component, RAID arrays, clustered server.)

If communications are lost with the server does the client provide a means for the patron to cash out?

Technical Standard [1.130] Requirements for downloading software to a conventional gaming device or client station from a system supported game

When software is downloaded to a device or client and activated will accounting meter information be destroyed? If so, how will the gaming system make sure that the final meter reading is reported to the accounting system prior to the destruction of the meter information?

Will an error or tilt condition prevent the addition or removal of software from the device or client?

Technical Standard [1.135] Requirements for downloading software to a conventional gaming device or client station from a system based game

When software is added or removed from a system based game will accounting meter information be destroyed for that particular software (paytable) be destroyed? If so, how will the gaming system make sure that the final meter reading is reported to the accounting system prior to the destruction of the meter information?

Will an error or tilt condition on a client prevent the addition or removal of the software being used by that client?

Technical Standard [1.140] Conditions for changing active software on a conventional gaming device or client station that is part of a system supported or system based game.

Describe how the system determines that the device or client has been idle with no errors or tilts for four minutes. Is this timeframe adjustable?

Describe how the system disables the game for a minimum of 4 minutes prior to making the new active software available. Is this timeframe adjustable?

While the device or client is disabled what message is displayed to the patron?

Does the system allow for a patron to request a change to the active software?

Technical Standard [2.010] Accounting Requirements

Describe any methods that can be used to change the device payback percentage (program change, soldered jumpers, software settable top award values, etc.).

List and describe all software selectable device options (buttons, keypads, etc.).

List and describe hardware selectable device options. What are the differences in theoretical payback percentages for each of the different coin play amounts? Does the device have electronic meters (at least 6 digits) for storing the number of game plays in each category of wager (1 Coin games, 2 Coin Games, etc.) if the difference in theoretical payback percentage is greater than 4% between the min and max coins wagered?

Technical Standard [2.020] Accounting of Inappropriate Coin-Ins

What is the response of the device to inappropriate coins-in? How does the device return coins or accumulate credit for extra coins in?

How are these coins accounted for? Do they register on coin-in and coin-out meters? What provisions have been made to minimize inappropriate coins-in?

Technical Standard [2.030] Accounting of Hopper Payouts

Does the device count coins paid out as the result of an EXTRA COIN PAY or a HOPPER RUNAWAY? How are these coins accounted for in the device metering? Are the counts displayed?

What are the hopper payout limits for the device? Do they permit the gaming establishment to comply with published IRS regulations?

Technical Standard [2.040] Meters for gaming devices, system supported and system based games

Does the game have electronic digital storage meters of at least 10 digits for accumulative storage of IN, OUT, and DROP totals? What additional soft meter information is accumulated?

Do the COIN-IN meters accumulate all coin and credit transactions that result in wagers? Do the COIN-OUT meters accumulate all coin and credit transactions paid by the gaming device for winnings combinations? Will the in and out meters always correctly reflect the percentage hold of the device regardless of the play methods? Do the DROP meters accumulate all coins that have been diverted to the drop?

Describe the steps needed to display all soft meter information? How are the soft meters cleared or reset.

What other game performance statistical information is stored? What steps are required to display statistical information? What steps are required to clear statistical information?

Describe the meters used to store and display the number of game plays since power was turned on and the number of game plays since the door was closed. What steps are needed to recall this information? If these meters reach their max value do they remain at max value until the occurrence of the appropriate event?

How is the following metered information continuously displayed for the player: number of COINS or CREDITS WAGERED, number of COINS or CREDITS WON, number of COINS PAID by the HOPPER, number of CREDITS AVAILABLE? Is any display shared by more than one set of meter readings?

How long will stored electronic meter information be preserved when no power is available to the gaming device?

Technical Standard [2.045] Meters for system based games

Are client stations capable of displaying the accounting information upon demand? Is the server portion of the system capable of displaying the meter information for any of the client stations upon demand?

Describe the method used to communicate accounting information to an external accounting system.

Technical Standard [2.050] Credit Play Requirements

Describe any non hopper payout methods (printer tickets, account credit, etc.).

Does the game use credits? What is the coin in credit limit? What is the credit accumulation limit from winning payouts? Does the device make partial payouts from wins over a certain credit amount? Can coins be inserted if credit limit has been reached? Describe any selectable options that affect the credit feature.

Do inserted coins accumulate directly on the credit meter or coins wagered?

Can credits from inserted coins be cashed out directly or must they be wagered? If they can be cashed out directly, does the game use a coin receiver that accepts coins based on their metallic content?

Can credits be accumulated by inserting currency? Does the bill acceptor accumulate the total number of each denomination bill that is accepted? Describe any currency acceptor or change device.

What is the aggregate total of collectible credits that can be accumulated from the insertion of currency (should not exceed \$3,000)?

What is the maximum amount which may be wagered on a single game? What is the maximum amount that may be wagered on special conditions such as double down bets, etc.?

Technical Standard [2.060] Award Cards

Include one copy of the par-sheet for the submitted device to this report.

Outline the methods used to identify and display award amounts for each specific winning combination. Are awards identified in denomination units, dollars, cents or in some other units? Is the award card displayed on the glass or the video screen?

How does the device reflect any change in award value that may occur in the course of play?

Attach a copy of the device display that shows the rules of play and the payoff schedule.

Technical Standard [2.070] Jackpot Odds

Do the odds of the submitted gaming device exceed 100 million to one? If so, how are these odds advertised to the patron.

Regulation 14.040

The theoretical pay out percentage of the device must be mathematically demonstrable. This percentage must not be less than 75 percent for each wager available. If a percentage of less than 75 percent is present, indicate such and attach a request for a waiver of the 75 percent standard.

Provide the calculations upon which the determinations of the probabilities of winning combinations were based. If player skill is involved, describe any known methods of play that would produce the best long-term average return to players.

Describe all random number generation processes and all game outcome selection processes. Identify algorithm used and show step by step implementation of the random number generator in the source code. Attach a copy of the source code used for the random number generation and the random

selection process. Identify RAM address locations, as the CPU sees them for random number generator seeds, parameters and data outcomes, etc.

Is every possible permutation or combination of game elements which produce winning or losing combinations available for random selection at the start of each game? If the game is a live game counterpart, does the appearance of each symbol or game element match the probability or appearance of identical elements in a live game? Are the appearances of all random game elements independent of PREVIOUS GAME OUTCOME, AMOUNT WAGERED, or STYLE OF PLAY?

What testing was conducted to check for patterning in the output of the random selection process? Are there any secondary decisions made which would affect the outcome of the game prior to it being displayed to the player.

Are any functions of the device altered as a result of internal computation of the hold or payback percentages of the device?

Additional Materials:

- 1) Electrical Schematics
- 2) Hardware Drawings
- 3) User Manuals
- 4) Digital photographs that portray an overall visual image of the nature of the device. If additional pictures are required to convey important game detail, they may be snapshot size.
- 5) A copy of all glass graphics and physical reel strips to scale.

The Potential Impact of the
NIGC's Proposed Class II Game Specification
Regulations on Class II Tribal Gaming

September 14, 2006

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Executive Summary

1. Despite the National Indian Gaming Commission's contention that certain forms of, or aids to, Class II gaming blur the line between Class II and Class III gaming, federal courts have repeatedly held that if the game being played is a bingo game, then the game and the electronic aid to the game is a Class II game under the Indian Gaming Regulatory Act's definition of Class II games. In addition, the differences in customer utilization rates between Class II and Class III games in the same casino suggest that consumers recognize the difference. In California and other states, tribes have voluntarily entered into compacts with revenue sharing provisions that require up to 25% of the terminal net win to go to the state. Given that tribes can operate unlimited Class II terminals without a revenue sharing obligation, but choose to pay a substantial premium to operate Class III games, it is not likely that existing Class II terminals blur the line from a revenue perspective. The reason is that even unsophisticated gaming customers are attracted to the faster speed of play, enhanced graphics and superior entertainment provided by the Class III terminals. The revenue perspective is the key perspective as it is based on machine appeal to the player – players consistently choose Class III games over current electronic aids to Class II games.
2. We estimate, based on our observations, that existing Class II terminals currently take between 4 and 6 seconds to play. The proposed NIGC guidelines could lead to an increase in the time required to play Class II terminals of between 10 and 16 seconds. We expect that at least 10 seconds will be added to the absolute minimum amount of time that a game meeting the proposed guidelines could be played.
3. The proposed regulations may reduce the number of available plays per terminal per day by 40% to 75% of the existing levels. Assuming that machine utilization remains unchanged, this would result in losses in Class II tribal gaming revenues of 40% to 75%. Our estimates are that annual tribal net win from Class II gaming will decrease by \$1.0 billion to \$3.4 billion depending on the current average daily net win rate and time of play of existing Class II games.
4. A tribe that has 1,000 Class II terminals, an average daily net win of \$250, and offers a variety of games that average 6 seconds to play in their current configurations would generate a total annual gaming win of \$91.25 million. The proposed changes would reduce this total by 40% or \$36.5 million per year making it difficult for the tribe to continue to support tribal education, healthcare and other support programs.
5. While these estimates assume that the overall utilization of Class II machines will not change, the proposed regulations could produce a game that is so slow and unpopular that utilization rates decline and overall revenue decrease by a larger fraction than suggested here. It is almost certainly the case that Class II gaming facilities that face local competition from tribal and commercial Class III gaming facilities will experience reduced machine utilization. For tribes without any reasonable option to offer Class III gaming, the proposed regulations could be a significant blow to the tribe's ability to provide support for healthcare, education and other tribal programs.

I. Introduction

The National Indian Gaming Commission (NIGC) with input from the Department of Justice has recently proposed rules and regulations regarding what constitutes a Class II tribal gaming device. Both parties argue that technological advances have resulted in Class II gaming devices that blur the line between Class II and Class III gaming devices. As we note in our discussion, the federal courts have consistently sided with tribes and game manufacturers when a technological aid is used to play a bingo game. The courts have been able to see a discernable line between Class II and Class III gaming. Class II devices are essentially a “hi tech” way of playing bingo. Despite their appearance, Class II gaming terminals are played under the same rules as a live-session bingo game with many of the side games, bonus wins, jackpots and other features associated with live-session bingo. The primary effect of the current proposals is to slow down the play of Class II gaming devices. The slower games will in turn lead to less play of Class II devices even if the marketability of the games to customers is not affected by the slow play. The slower games will in turn lead to less overall gaming revenue for tribes that offer Class II gaming. The impacts may be substantial if the speed of play is reduced by a significant amount. Revenues will be further affected if customers find the slower games unappealing.

This study reviews the existing legal and regulatory framework concerning Class II tribal gaming and how the proposed changes will impact Class II gaming. We examine how technologic aids to the play of Class II gaming currently operate and how the proposed changes will influence Class II gaming with particular attention being paid to

the impact on the speed of play of a Class II device. Finally we estimate the impact of the proposed regulations on tribal gaming revenues and tribal livelihoods.

II. Overview of Class II Gaming

A. *The Indian Gaming Regulatory Act*

1. Classes of Gaming

In *Seminole Tribe vs. Butterworth* (1979)¹ and *California v. Cabazon Band and Morongo Bands of Mission Indians* (1987)², the courts ruled in favor of the tribe's right to legally conduct gaming operations without regulation from the states. The courts ruled that if state criminal law allows or does not specifically prohibit a form of gaming, then the tribes in the state may legally engage in that form of gaming without regulation from the state. Likewise, if state law criminally prohibits a form of gaming, then the tribes within the state may not engage in that form of gaming activity. As a result of the *Seminole* decision and the impending *Cabazon* decision, Congress passed the Indian Gaming Regulatory Act of 1988 (IGRA)³.

While the IGRA recognizes the rights of Indian tribes to conduct gaming activities, it also places certain restrictions on these activities. The IGRA identified three broad classes of gaming activity to be regulated. The three classes are:

Class I - The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

Class II - The term "class II gaming" means—

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—

¹Seminole Tribe of Fla .v. Butterworth, 658 F.2d 310 (5th Cir. 1981)

² 480 U.S. 202 (1987).

³ Public Law No. 100-497, 102 Stat. 2467 (1988) as amended, codified at 25 U.S.C. §2701 *et seq.*

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that—

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

The term “class II gaming” does not include—

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

Class III – The term “class III gaming” means all forms of gaming that are not Class I gaming or Class II gaming.⁴

Class I gaming is regulated solely by the tribal government. Class II gaming is regulated by the tribal government and the NIGC. Class III gaming may only be conducted under the terms of a Tribal-State Compact and is then regulated by tribal governments, the NIGC and the states under the terms of the specific compact.

The biggest controversy concerning Class II gaming has come in deciding whether certain games are “bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)” and are Class II games or “electronic or electromechanical facsimiles of any game of chance” and are Class III games. The states have generally argued that anything that looks like a slot machine is a Class III

⁴ 25 U.S.C. §2703.

game and can not be operated without a compact. The tribes have argued that as long as the primary game being played meets the definition of bingo, then the game is a Class II game and can be operated without interference from the state. There have been multiple court cases in multiple federal circuits dealing with this distinction. The courts have universally held that if the underlying game is bingo, then the machine is a Class II game and not subject to a Tribal-State Compact.⁵

The NIGC has attempted to clarify the distinction between Class II and Class III gaming by issuing its own guidelines that are in part based on the body of existing court decisions. However, the courts have generally taken the more simple view of whether not the underlying game satisfies the definition of bingo and not whether the games adhere to specific technical guidelines. As we will discuss below, the issue is complicated by the fact that the Department of Justice has argued that Class II games using electronic or computer aids are illegal under existing federal law. The Department of Justice has also been opposed to the NIGC's guidelines and would like to see the NIGC make a more rigorous distinction between Class II and Class III gaming.

2. Revenue Sharing

Congress understood that states may attempt to tax tribal gaming in exchange for signing a compact and explicitly forbid such arrangements in the IGRA. Specifically the IGRA states that

“nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian

⁵ For a discussion of the relevant case law see McNeil Staudenmaier and Lynch, 2004, “The Class II Gaming Debate: The Johnson Act vs. The Indian Gaming Regulatory Act”, *Gaming Law Review* 8:4, 227-237.

tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.⁶”

As a practical matter, the Secretary of the Interior has approved compacts that include “revenue sharing” provisions by which the state is able to receive a portion of a tribes net gaming win in exchange for granting the tribes some exclusive rights to Class III gaming. In some cases, the revenues sharing provision allocates as much as 25% of the net gaming win to the state. Tribes often complain that such provisions violate the IGRA but often have few options but to enter into compacts with revenue sharing provisions in order to offer Class III gaming. The ability to offer competitive Class II gaming is one of the few forms of leverage that the tribes have when negotiating the compacts.

3. “Good Faith” Negotiations

The IGRA required that the states must negotiate the compacts “in good faith”. If the states and tribes fail to reach a compact, then the IGRA calls for binding mediation. However, in the 1996 *Seminole Tribe of Florida v. Florida* decision the U.S. Supreme Court ruled that the tribes could not force states to enter negotiations.⁷ As a result, a tribe currently has little avenue to pursue a Tribal-State Compact if the state refuses to negotiate. The end result is that many tribes, even in states that allow some forms of commercial Class II gaming, can only pursue Class II gaming. In addition, this decision greatly reduces the leverage tribal governments have when

⁶ 25 U.S.C. §2710(4).

⁷ 517 U.S. 44 (1996)

negotiating compacts in states willing to allow Class III Gaming. The tribes are currently left with little choice but to take the terms offered by the state.

B. The Johnson Act and Tribal Gaming

The Johnson Act, as amended in 1962, makes it illegal to possess, use, sell or transport any “gaming device”.⁸ The language is sufficiently broad to include virtually any gaming device. The IGRA specifically excludes Class III gaming devices used under the terms of a Tribal-State Compact from the Johnson Act. The Department of Justice has argued that any electronic and technological aids used in the operation of many Class II games make the devices illegal under the terms of the Johnson Act. As noted above, the federal courts have held that if the underlying game fits with the definition of a Class II game, then electronic aids can not make the game into a Class III game. In two recent cases where the federal courts made such decisions, the Department of Justice filed a Petition for Writ of Certiorari with the Supreme Court asserting that the IGRA does not exempt tribes from the Johnson Act if gambling devices are used outside of a Tribal-State Compact.⁹ In each case, the U.S. Supreme Court denied the Department of Justice’s Petitions without comment.

C. Current State of Class II Tribal Gaming

The federal courts have consistently held that if technological aids are to a bingo game, then they meet the Class II definition intended in the IGRA. The Courts do not

⁸ 15 U.S.C. § 1171

⁹ The two cases are *United States v. Santee Sioux Tribe of Nebraska*, 324 F. 3d 607 (8th Circuit 2003) and *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F. 3d 1019 (10th Circuit 2003).

seem to exhibit any deference to the NIGC's definitions of Class II gaming but have instead relied on a more basic standard.¹⁰ However, the Department of Justice and the NIGC have continued to move toward greater regulation of and restrictions on Class II gaming.

In October of 2005 the Department of Justice introduced the "Gambling Devices Act Amendments of 2005."¹¹ The proposed legislation would essentially amend the Johnson Act to exempt Class II games as long as the games meet certain standards outlined in the Act and are certified by the NIGC. It should be noted, that the courts have already established that existing games that meet the definition of Class II gaming are exempt from the Johnson Act. The NIGC has issued its own proposed guidelines for certification of a game as an allowable Class II game.¹² Under the proposed legislation, Class II games would have to meet additional standards beyond those currently required by the courts. In the following sections we detail these proposed standards and their likely effects. The proposed legislation has not been introduced in Congress but the Department of Justice has indicated that it will seek to have the bill introduced after a series of recent consultations with tribes and a period of public comments.

III. The Proposed Standards

The Department of Justice's proposed legislation would amend the Johnson Act to include Class II gaming devices as follows:

¹⁰ See McNeil Staudenmaier and Lynch (2004) *supra* note 5 for further discussion.

¹¹ Available at www.usdoj.gov/otj/Johnson_Act_Amendment_Bil.doc.

¹² 25 CFR Part 502 Definition for Electronic or Electromechanical Facsimile and 25 CFR Parts 502 and 546 Classification Standards; Class II Gaming; Bingo, Lotto, et al.;

(i) the gambling device has been certified as, or is transported for the purpose of certifying it as, a Class II technologic aid pursuant to regulations adopted by the National Indian Gaming Commission; and (ii) the use of the gambling device in Class II gaming is conducted pursuant to the requirements of the Indian Gaming Regulatory Act and regulations adopted by the National Indian Gaming Commission.”¹³

The proposed Act goes on to impose certain standards for the regulations that the NIGC must adopt in order to certify a Class II gaming device. Specifically, Class II gaming

(i) is limited to games that require the players to compete against other individuals in order to win one or more common prizes;
(ii) requires the players to actively participate in the game;
(iii) does not allow players to win prizes for games based, in whole or in part, on games that do not constitute Class II gaming; and
(iv) is readily distinguishable from Class III games based upon the manner in which the players participate in the game and the appearance of the game to the players, including but not limited to the speed of play and depictions or graphics used in the game.¹⁴

and

(A) during the game, the bingo card or cards must be displayed throughout the bingo game even if the bingo cards are electronically generated;
(B) the bingo numbers or characters for that game must be randomly drawn or determined after the start of play for the game;
(C) the permissible minimum number of ball drops per bingo game shall be determined by regulations adopted by the National Indian Gaming Commission;
(D) for each ball drop, the numbers or characters on the bingo balls are to be revealed to the players one at a time with sufficient time for the players to take an overt action to cover or daub the bingo card after each ball drop; and
(E) a minimum number of two individual players are required for play of a bingo game to commence.¹⁵

The NIGC has published its own guidelines that include several additions to the Department of Justice’s proposed legislation. We focus on those requirements that have

¹³ “Gambling Devices Act Amendments of 2005”, Page 3, lines 7-13.

¹⁴ “Gambling Devices Act Amendments of 2005”, Page 4, lines 10-22.

¹⁵ “Gambling Devices Act Amendments of 2005”, Page 5, lines 15-22, Page 6 lines 1-6.

the potential to affect the time of play. The NIGC's requirements address the minimum number of players in the following manner:

"In an effort to quantify this for game design, the Commission proposes that games encourage play with six (6) or more participants. It has drafted the rule to allow a short but reasonable period for these additional players to enter the game after the first player enters. If six (6) players do not enter within two (2) seconds, the game can begin with a minimum of two players."¹⁶

While not adding a required number of players beyond the minimum of two proposed by the Department of Justice, the NIGC requirements add a waiting period beyond just having two players enter the game.

The Department of Justice's proposal called for the NIGC to determine the minimum number of ball drops and the NIGC has fixed that at two with each requiring a minimum two seconds.¹⁷ Finally, the NIGC's requirements further define the game of bingo so that each player must be playing with common probabilities of winning the same prize. Specifically,

"A game may offer players the opportunity to play at different entry wagers, and the prizes in the game may be increased, or a progressive prize offered, based on a higher entry wager, so long as all prizes are based on achieving pre-designated winning patterns common to all players."¹⁸

and

"Each game must provide an equal chance of obtaining any winning pattern for each card played by an active player in the game. The probability of achieving any particular pre-designated winning pattern for a participating player in the game may not vary based on the amount wagered by that player."¹⁹

¹⁶ 25 CFR Parts 502 and 546 Classification Standards; Class II Gaming; Bingo, Lotto, et al.; § 6

¹⁷ *Id* at § 546.6 (c)

¹⁸ *Id* at § 546.6 (b)

¹⁹ *Id* at § 546.6 (1)

At the current time, Class II gaming operations allow for a variety of games with different themes, different frequencies of intermediate wins and different bonus games all while playing in the same bingo game. Consumers prefer a variety of games. Some players prefer smaller and more frequent payouts while others prefer larger but less frequent payouts. The impact of the proposed rule change will either force casinos to offer a smaller variety of games or increase the waiting time beyond two seconds as someone waits for another player to play the exact same game as they are playing. The waiting time could become particularly long at off peak times of the day.

For the purposes of our analysis, we played a variety of Class II games from different manufacturers and at different casinos. Current Class II games take between 4 seconds and 6 seconds to play depending on the number of balls drops involved in each game.²⁰ Anecdotally, we understand there are Class II terminals at other tribal operations that play in less time and terminals that take more time. We estimate that the rules will produce a game that takes a minimum of 10 seconds to play. The primary increases in time come from the requirements of a minimum waiting period of 2 seconds between games, a minimum of 2 ball drops with 2 seconds between each, the common probabilities requirement and the requirement that each ball be revealed “one at a time” on the screen.²¹ These requirements will increase the time required to play a Class II game by a minimum of 4 to 6 seconds.

²⁰ The 4 to 6 seconds represents the time required from the beginning to the end of a bingo game. There is also additional time between each game as players collect winnings, add credits to their terminals, change bingo cards and otherwise relax. We have assumed this time is constant across games regardless of their speed of play and will not be affected by the rules changes.

²¹ The requirement is technically that the balls must be released one at a time but we are assuming that also means they are to be revealed to the player one at a time.

It is possible that the proposed requirements could produce a game that takes longer than 10 seconds. The NIGC guidelines require that during the ball drops that each ball be revealed “one at a time”. The NIGC’ calls for the 2 ball drops to take 2 seconds each. However, there may be technical limitations to the rate at which the computer screen refreshes such that dropping and revealing the balls to the player take considerably longer than 4 seconds. As noted above, the common probabilities requirement may also produce a significant increase in the amount of time a player spends waiting to find someone else to play the same game.

IV. The Impact of the Proposals

A) Specific Impact on Gaming Terminal Revenues

As noted above the proposed guidelines for Class II games will produce a slower game. There are four major provisions that impact the speed of play:

- The game must have at least two players and there must be a 2 second interval between each game in order to allow additional players a chance to join the game;
- There must be common probabilities for each prize;
- Players must have at least 2 seconds between each round to daub;
- There must be at least two releases of numbers, they must take at least 2 seconds and each ball must be released one at a time.

The current game already involves many of these functions and these additional requirements alone may not add a full 8 seconds to the time required to play the game. However, the proposed requirements may have additional impacts on the speed of play. The “common probabilities” requirement may result in a longer time in matching up two players than 2 seconds especially during non-peak gaming hours unless casinos alter the game varieties and location of the games as discussed above. The release requirement

stipulates that the numbers must be released and appear on the screen one at a time. There is some concern that it may take a minimum of 6 seconds for the release given the limitations of the screen's refresh rate and/or human's ability to perceive objects.²²

There is not currently a Class II gaming device that operates under the proposed regulations. As a result it is difficult to estimate the total amount of time a terminal that meets the guidelines will take to play. Based on our timing analysis, we estimate that the proposed game will take a minimum of 10 seconds to play. This assumes that any technical limitations can be overcome and that a casino can offer a sufficient variety of machines without the common probabilities requirement inducing too much additional wait time. A total time of play of 16 seconds is a likely upper bound estimate based on machines we observed. However, in cases where the common probabilities problem is binding (i.e. smaller Class II gaming operations) or if the requirement of revealing one ball at a time can not be technically achieved in 2 seconds then this upper bound may become the norm.

If the combined impact of the rule changes produces a game that takes 10 seconds to play, then this would produce an increase of 4 to 6 seconds depending on the format of the current game. As a result, a 10 second game would result in a 40% reduction in the number of games that could be played each day for a game that currently takes 6 seconds and a 60% reduction for a game that currently takes 4 seconds to play. Table 1 provides details of various increases in the time to play given the current speed of the game.

The second issue is how the reduction in the speed of play will affect the revenue generated by Class II gaming terminals. The slower speed of play will lead to fewer total

²² For further details see the discussion in the Transcripts of Hearings from the July 27th, 2006 meeting of the NIGC staff and tribal representatives in Ontario, California, pages 174-178.

Table 1: The Impact of the Proposed Rule Changes on Number of Possible Plays			
<u>Current Amount of Time per Play</u>			
Casino Open 24 hours	95%	95%	95%
Machine available hours per day	22.8	22.8	22.8
Average time to play game - in seconds	4	5	6
Possible Plays available per day per machine	20520	16416	13680
<u>Impact of a 10 second Time Per Play</u>			
Casino Open 24 hours	95%	95%	95%
Machine available hours per day	22.8	22.8	22.8
Average time to play game - in seconds	10	10	10
Possible Plays available per day per machine	8208	8208	8208
% Decline in Number of Possible Plays per Day	60.00%	50.00%	40.00%
<u>Impact of a 12 second Time Per Play</u>			
Casino Open 24 hours	95%	95%	95%
Machine available hours per day	22.8	22.8	22.8
Average time to play game - in seconds	12	12	12
Possible Plays available per day per machine	6840	6840	6840
% Decline in Number of Possible Plays per Day	66.67%	58.33%	50.00%
<u>Impact of a 14 second Time Per Play</u>			
Casino Open 24 hours	95%	95%	95%
Machine available hours per day	22.8	22.8	22.8
Average time to play game - in seconds	14	14	14
Possible Plays available per day per machine	5863	5863	5863
% Decline in Number of Possible Plays per Day	71.43%	64.29%	57.14%
<u>Impact of a 16 second Time Per Play</u>			
Casino Open 24 hours	95%	95%	95%
Machine available hours per day	22.8	22.8	22.8
Average time to play game - in seconds	16	16	16
Possible Plays available per day per machine	5130	5130	5130
% Decline in Number of Possible Plays per Day	75.00%	68.75%	62.50%

plays per day and less revenue from each terminal. There are also two additional factors that could influence machine utilization and the revenue stream generated by a terminal. First, the slower speed of play may induce a customer to play for a shorter or longer period of time. A slower game allows for more play for given amount of money. As a result, Class II terminals may experience higher utilization rates as a result of the rule changes. The second factor is that a slower game is a less popular game. Tribal casinos with both Class II and Class III terminals report significantly less utilization for the Class II terminals.²³ Slower play may frustrate players and induce them to leave the Casino sooner or visit less frequently if at all. For example consider the statement of NIGC Chairman Hogan:

“Don't put equipment on that floor that is going to get your players so trained that all they're used to doing is Class III, because they won't like games that might require more interaction. And that will be a disappointment to them and may have a negative market impact.”²⁴

As noted above, the common probabilities requirement will likely result in a smaller variety of machines which could further reduce player interest. The combination of these factors could lead to an increase, decreases or no net change in machine utilization rates. It will likely vary with the amount of competition a tribe faces from other gaming sources. If casino patrons have a nearby source of Class III gaming, the utilization will likely decline. For our revenue analysis, we assume no net change in the machine utilization rates. However, if the utilization rate increases, then revenues would fall by a

²³ Transcripts of Hearings from the July 27th, 2006 meeting of the NIGC staff and tribal representatives in Ontario, California, pages 26-17 one tribe reported that the Class II terminals generate 30% to 40% of the revenue generated by the Class III terminals in their facility.

²⁴ *Id* page 10.

smaller amount and if the utilization rate decreases, then the revenues would decrease by a larger amount.

Given our assumption that utilization rates will stay the same if the proposed guidelines are implemented, then the percentage decline in actual play will be the same as that reported in Table 1 in for possible plays. Table 2 summarizes the impact of the increased time of play on the actual number of plays.

Table 2: The Impact of the Proposed Rule Changes on Number of Available Plays			
New Time Required to Play the Game	Current Time to Play the Game		
	4 seconds	5 seconds	6 seconds
Decline in number of Available Plays:*			
10 seconds	60.00%	50.00%	40.00%
12 seconds	66.67%	58.33%	50.00%
14 seconds	71.43%	64.29%	57.14%
16 seconds	75.00%	68.75%	62.50%
* Assumes Machine Utilization Rate Stays the Same			

In Tables 3A through 3C, we present our estimates of the impact on total revenues per terminal per day for a variety of casino operating conditions. We assume that a casino is open 24 hours a day and that a terminal is available for play for 95% of that time. In addition, we assume that the current average time to play a terminal is from 4 to 6 seconds and we allow the utilization rates to vary on both weekends and weekdays as noted in the tables. In addition, we assume the current average daily net win varies from \$100 per terminal per day to \$400 per terminal per day. While there is not a precise

Table 3A: Impact of Proposed Rule Changes on Actual Plays and Revenues				
<u>Current Amount of Time per Play</u>				
Casino Open 24 hours	95%	95%	95%	95%
Machine available hours per day	22.8	22.8	22.8	22.8
Average time to play game - in seconds	6	6	6	6
Machine Utilization: Weekdays	35%	40%	45%	50%
Machine Utilization: Weekends	65%	70%	75%	80%
Plays per weekday based on utilization	4788	5472	6156	6840
Plays per weekend day based on utilization	8892	9576	10260	10944
Average Plays per day	5961	6645	7329	8013
Average Daily Net Win Rate per Terminal	\$100	\$150	\$200	\$250
<u>Impact of a 10 second Time Per Play</u>				
Average time to play game - in seconds	10	10	10	10
Average Plays per day	3576	3987	4397	4808
% Decline in Average Plays per Day	40.00%	40.00%	40.00%	40.00%
Implied Net Win Rate	\$60	\$90	\$120	\$150
Decline in Total Revenues per day per Terminal	\$40	\$60	\$80	\$100
<u>Impact of a 12 second Time Per Play</u>				
Average time to play game - in seconds	12	12	12	12
Average Plays per day	2980	3322	3664	4006
% Decline in Average Plays per Day	50.00%	50.00%	50.00%	50.00%
Implied Net Win Rate	\$50	\$75	\$100	\$125
Decline in Total Revenues per day per Terminal	\$50	\$75	\$100	\$125
<u>Impact of a 14 second Time Per Play</u>				
Average time to play game - in seconds	14	14	14	14
Average Plays per day	2555	2848	3141	3434
% Decline in Average Plays per Day	57.14%	57.14%	57.14%	57.14%
Implied Net Win Rate	\$43	\$64	\$86	\$107
Decline in Total Revenues per day per Terminal	\$57	\$86	\$114	\$143
<u>Impact of a 16 second Time Per Play</u>				
Average time to play game - in seconds	16	16	16	16
Average Plays per day	2235	2492	2748	3005
% Decline in Average Plays per Day	62.50%	62.50%	62.50%	62.50%
Implied Net Win Rate	\$38	\$56	\$75	\$94
Decline in Total Revenues per day per Terminal	\$63	\$94	\$125	\$156

Table 3B: Impact of Proposed Rule Changes on Actual Plays and Revenues**Current Amount of Time per Play**

Casino Open 24 hours	95%	95%	95%	95%
Machine available hours per day	22.8	22.8	22.8	22.8
Average time to play game - in seconds	5	5	5	5
Machine Utilization: Weekdays	35%	40%	45%	50%
Machine Utilization: Weekends	65%	70%	75%	80%
Plays per weekday based on utilization	5745.6	6566.4	7387.2	8208
Plays per weekend day based on utilization	10670.4	11491.2	12312	13132.8
Average Plays per day	7153	7973	8794	9615
Average Daily Net Win Rate per Terminal	\$200	\$250	\$300	\$350

Impact of a 10 second Time Per Play

Average time to play game - in seconds	10	10	10	10
Average Plays per day	3576	3987	4397	4808
% Decline in Average Plays per Day	50.00%	50.00%	50.00%	50.00%
Implied Net Win Rate	\$100	\$125	\$150	\$175
Decline in Total Revenues per day per Terminal	\$100	\$125	\$150	\$175

Impact of a 12 second Time Per Play

Average time to play game - in seconds	12	12	12	12
Average Plays per day	2980	3322	3664	4006
% Decline in Average Plays per Day	58.33%	58.33%	58.33%	58.33%
Implied Net Win Rate	\$83	\$104	\$125	\$146
Decline in Total Revenues per day per Terminal	\$117	\$146	\$175	\$204

Impact of a 14 second Time Per Play

Average time to play game - in seconds	14	14	14	14
Average Plays per day	2555	2848	3141	3434
% Decline in Average Plays per Day	64.29%	64.29%	64.29%	64.29%
Implied Net Win Rate	\$71	\$89	\$107	\$125
Decline in Total Revenues per day per Terminal	\$129	\$161	\$193	\$225

Impact of a 16 second Time Per Play

Average time to play game - in seconds	16	16	16	16
Average Plays per day	2235	2492	2748	3005
% Decline in Average Plays per Day	68.75%	68.75%	68.75%	68.75%
Implied Net Win Rate	\$63	\$78	\$94	\$109
Decline in Total Revenues per day per Terminal	\$138	\$172	\$206	\$241

Table 3C: Impact of Proposed Rule Changes on Actual Plays and Revenues**Current Amount of Time per Play**

Casino Open 24 hours	95%	95%	95%	95%
Machine available hours per day	22.8	22.8	22.8	22.8
Average time to play game - in seconds	4	4	4	4
Machine Utilization: Weekdays	35%	40%	45%	50%
Machine Utilization: Weekends	65%	70%	75%	80%
Plays per weekday based on utilization	7182	8208	9234	10260
Plays per weekend day based on utilization	13338	14364	15390	16416
Average Plays per day	8941	9967	10993	12019
Average Daily Net Win Rate per Terminal	\$250	\$300	\$350	\$400

Impact of a 10 second Time Per Play

Average time to play game - in seconds	10	10	10	10
Average Plays per day	3576	3987	4397	4808
% Decline in Average Plays per Day	60.00%	60.00%	60.00%	60.00%
Implied Net Win Rate	\$100	\$120	\$140	\$160
Decline in Total Revenues per day per Terminal	\$150	\$180	\$210	\$240

Impact of a 12 second Time Per Play

Average time to play game - in seconds	12	12	12	12
Average Plays per day	2980	3322	3664	4006
% Decline in Average Plays per Day	66.67%	66.67%	66.67%	66.67%
Implied Net Win Rate	\$83	\$100	\$117	\$133
Decline in Total Revenues per day per Terminal	\$167	\$200	\$233	\$267

Impact of a 14 second Time Per Play

Average time to play game - in seconds	14	14	14	14
Average Plays per day	2555	2848	3141	3434
% Decline in Average Plays per Day	71.43%	71.43%	71.43%	71.43%
Implied Net Win Rate	\$71	\$86	\$100	\$114
Decline in Total Revenues per day per Terminal	\$179	\$214	\$250	\$286

Impact of a 16 second Time Per Play

Average time to play game - in seconds	16	16	16	16
Average Plays per day	2235	2492	2748	3005
% Decline in Average Plays per Day	75.00%	75.00%	75.00%	75.00%
Implied Net Win Rate	\$63	\$75	\$88	\$100
Decline in Total Revenues per day per Terminal	\$188	\$225	\$263	\$300

estimate of the number of Class II games currently in use, NIGC Chairman Hogan indicated that reported estimates are around 50,000 and that 80% of tribal gaming revenues come from Class III gaming.²⁵ A \$250 per terminal per day is consistent with all of the remaining 20% of revenues coming from Class II terminals and 50,000 total terminals.²⁶ We allow the average daily net win rates to vary in order to represent individual tribal casinos where existing terminals may be more or less profitable based on local market conditions with the \$250 net win being the upper bound estimate for all Class II terminals. The actual impact of the proposed regulations will vary by the actual number of Class II terminals currently in operation and their actual profitability. Table 3A presents the relative decline in number of available plays and the impact on the average daily net win for a Class II terminal that currently takes 6 seconds to play. If the time of play increases to 10 seconds, then the average daily net win per terminal for a tribal casino currently earning \$100 per terminal per day would drop to \$60 a day. For a tribe earning \$250 per terminal per day on a six second game, the average net win would drop to \$150 per terminal per day for a 10 second game and to \$96 per terminal per day for a 16 second game.

As the tables indicate, the proposed rule change may have a significant impact on actual plays and revenues per terminal. The estimated declines range from 40% to 75% depending on the current speed of the game and the likely future speed upon the adoption of the proposed guidelines. This represents a decline in average daily net win of between

²⁵ See page 52 of the Transcripts of Hearings from the July 27th, 2006 meeting of the NIGC staff and tribal representatives in Ontario, California for the 50,000 estimate and page 21 of the Transcripts of Hearings from the August 8th, 2006 meeting of the NIGC staff and tribal representatives in Oklahoma City, Oklahoma.

²⁶ For example $[(\$22.6 \text{ billion per year}) * (20\%) \div (50,000 \text{ terminals}) * (365 \text{ days})] = \$247.67 \text{ per terminal per day.}$

\$40 and \$300 per day. As expected the losses are greatest for the terminals that currently operate at 4 seconds because they experience the largest increase in additional playing time.

B. Impact on Tribal Casino Revenues

Consider a tribe that has 1,000 class II terminals, an average daily net win of \$250 and offers a variety of games that average 6 seconds to play in their current configurations. This represents a total annual gaming win of \$91.25 million per year. The proposed changes would reduce this total by 40% or \$36.5 million per year. It is important to remember that this \$250 average daily net win is just net of the winnings returned to the customers. It is not net of the machines costs, the costs of casino personnel or overhead. In many cases, decreases on revenues of this magnitude may allow a tribe to continue its operations but it would significantly reduce the amount of money available

Table 4: Impacts of Proposed Regulations on Hypothetical Tribal Casinos				
Number of Terminals	1000	1250	1500	2000
<i>Current:</i>				
Average time to Play Game - in seconds	6	6	6	6
Average Daily Net Win Rate per Terminal	\$175	\$225	\$250	\$300
Annual Net Win	\$63,875,000	\$102,656,250	\$136,875,000	\$219,000,000
<i>Future:</i>				
Average time to Play Game - in seconds	10	10	10	10
Average Daily Net Win Rate per Terminal	\$105	\$135	\$150	\$180
Annual Net Win	\$38,325,000	\$61,593,750	\$82,125,000	\$131,400,000
Decrease in Annual Net Win	\$25,550,000	\$41,062,500	\$54,750,000	\$87,600,000

for the support of tribal programs for education and healthcare. In other cases, Class II operations with less competitive locations and/or significant market competition may be forced to stop offering Class II gaming altogether. Table 4 provides several scenarios for hypothetical casinos and the impact of the proposed regulations. The impact is nontrivial and in each scenario is under the assumption of an average current game time of 6 seconds and an increase to 10 seconds per game. If the tribe's current games are quicker or the proposed regulations have a larger negative impact, then the declines in annual net wins will be even larger.

As noted above, our analysis assumes that the overall utilization of gaming terminals remains unchanged by the proposed rule changes. In communities where there are competing forms of gaming, then it is likely that machine utilization will decrease. If someone can drive an extra half-hour or hour for class III gaming, then the relative decrease in the speed of play and lower entertainment value of the redesigned games will likely result in less play as customers go elsewhere. Many of the states with Class II tribal gaming offer consumers the choice of Class III gaming, tribal or commercial, within a reasonable driving distance. If Class II gaming remains as the only game in town, then utilization may increase as people prolong the amount of time they are able to play for a given amount of money. Hence our revenue estimates represent an aggregate view of no net change in utilization rates. In those situations where Class II gaming is the only available game, then tribal casinos may see smaller declines in revenue that we have estimated here but Class II tribal operations with more competition will undoubtedly experience a larger decline in revenues than presented here.

C. The Overall Effects on Tribal Gaming Revenue

To put these numbers in perspective one must consider the overall impact on tribal gaming revenues. Table 5 presents the potential nationwide loss of Class II gaming revenues from the proposed rule changes. If the average daily net win rate is \$200 for all 50,000 Class II terminals and the increase in required time to play a terminal is 5 seconds for 10 second total time of play, then the total annual decline in revenues would be $(50,000 \text{ terminals} * 365 \text{ days} * \$100/\text{day}) = \$1.82 \text{ billion}$. Table 5 gives our estimates for an average daily net win rate of \$150 to \$250 for existing Class II terminals and existing average times per play of 4 to 6 seconds for current terminals. If existing terminals are faster or more profitable, then the loss of revenues would be greater. If existing terminals are slower or less profitable, then the loss of revenues would be smaller. These estimates represent a wide range of possible impacts. However, in the scenario with the smallest impact we are still faced with the regulations costing the tribes almost \$1 billion per year in revenue.

The impact will not be felt by local tribes alone. Local economies will be greatly impacted. The National Indian Gaming Association (NIGA) 2005 Economic Impact Study reports that the \$22.6 billion in tribal gaming was responsible for 600,000 jobs in tribal gaming and \$9.7 billion in state and federal government tax revenue and revenue savings.²⁷ Our numbers suggest that the proposed regulations would reduce overall tribal gaming revenues by 5% to 10% which would imply a similar reduction in gaming jobs and government revenues from gaming. As we discuss below, part of this may be offset by increased Class III gaming revenues but such substitutions have important distributional impacts across tribes.

²⁷ Available at www.indiangaming.org.

Table 5: Impact of Proposed Rule Changes on Total Class II Revenues

Initial Assumptions			
Terminals in Operation	50,000	50,000	50,000
Current Average time to play	4 seconds	5 seconds	6 seconds
Average Daily Net Win Rate	\$150	\$150	\$150
	Annual	Annual	Annual
Proposed Game Time Per Play	Revenue Loss	Revenue Loss	Revenue Loss
10 second Time Per Play	\$1,642,500,000	\$1,368,750,000	\$1,095,000,000
12 second Time Per Play	\$1,825,091,250	\$1,596,783,750	\$1,368,750,000
14 second Time Per Play	\$1,955,396,250	\$1,759,938,750	\$1,564,207,500
16 second Time Per Play	\$2,053,125,000	\$1,882,031,250	\$1,710,937,500
Initial Assumptions			
Terminals in Operation	50,000	50,000	50,000
Current Average time to play	4 seconds	5 seconds	6 seconds
Average Daily Net Win Rate	\$200	\$200	\$200
	Annual	Annual	Annual
Proposed Game Time Per Play	Revenue Loss	Revenue Loss	Revenue Loss
10 second Time Per Play	\$2,190,000,000	\$1,825,000,000	\$1,460,000,000
12 second Time Per Play	\$2,433,455,000	\$2,129,045,000	\$1,825,000,000
14 second Time Per Play	\$2,607,195,000	\$2,346,585,000	\$2,085,610,000
16 second Time Per Play	\$2,737,500,000	\$2,509,375,000	\$2,281,250,000
Initial Assumptions			
Terminals in Operation	50,000	50,000	50,000
Current Average time to play	4 seconds	5 seconds	6 seconds
Average Daily Net Win Rate	\$250	\$250	\$250
	Annual	Annual	Annual
Proposed Game Time Per Play	Revenue Loss	Revenue Loss	Revenue Loss
10 second Time Per Play	\$2,737,500,000	\$2,281,250,000	\$1,825,000,000
12 second Time Per Play	\$3,041,818,750	\$2,661,306,250	\$2,281,250,000
14 second Time Per Play	\$3,258,993,750	\$2,933,231,250	\$2,607,012,500
16 second Time Per Play	\$3,421,875,000	\$3,136,718,750	\$2,851,562,500

D. The Broader Impact on Gaming Tribes

The impact of the Class II rule changes will also have a broader impact on gaming tribes. As noted above the IGRA does not allow for the taxation of tribal gaming and attempts to prohibit states from extorting payments beyond those to cover the potential costs associated with gaming from tribes. However, the 1996 Seminole decision greatly weakened tribe's ability to negotiate compacts with states. The operation of successful Class II gaming facilities increases tribal negotiating powers in several ways. First, by having a viable alternative to giving in to the state's demands for revenue sharing payments, the tribes are able to better negotiate the revenue sharing provisions of Tribal-State Compacts. In many cases, the successful operation of Class II facilities by tribes has helped to convince local communities and voters statewide that tribal gaming provides benefits to those communities. This support is helpful in influencing the political process that ultimately governs the compacting process in each state. Finally, even for tribes with Class III terminals, Class II terminals provide a mechanism for providing additional gaming devices for peak periods and reaching a more efficient casino size in situations where the costliness of revenue sharing provisions of Class II gaming do not make it feasible to add more class II terminals

It is also important to remember that in many cases, Class II gaming remains as the only viable option for tribes. In states like Florida and Alabama, where the state refuses to negotiate a compact, the tribes can only offer Class II gaming. In Florida, this puts the tribes in direct competition with commercial Class III gaming operations. In California and other states, governors have taken a stand that calls for tribes to pay a

substantial share of gaming revenues (on the order of 7% to 25% of average daily net win) in order to sign a compact. So tribes are faced with paying a steep price for Class III terminals or relying on Class II terminals. Many tribes are located in areas where the local market will not support Class III gaming at a level that is profitable under such revenue sharing provisions. There are often other tribes with Class II gaming between the tribe population centers. That leaves tribes with little choice but to offer only Class II gaming. However, the less appealing the Class II games are relative to Class III gaming, the more difficult it becomes for the tribes to even offer Class II gaming as local patrons are willing to drive the additional distance for class three gaming. Reducing the playability of Class II games makes the tribes significantly worse off because they do not have an option or a realistic option of offering Class III games.

It is likely that Class II gaming will remain most popular among tribes that can not obtain Class III compacts or with compacts but without enough market support to operate many Class III terminals. In most instances, the tribes without compacts are tribes that have lost their tribal lands and have difficulty getting compacts approved for newly acquired lands or tribes that were left with reservations not easily accessible to large population centers. These are generally the poorest tribes and restrictions on Class II gaming are likely to impact them the most. One result of these changes is likely a redistribution of revenues from Class II gaming to Class III gaming.

It is important to remember that in most cases this is not a question about tribal governments attempting to offer gaming in states that do not allow gaming. Forty-Four states sponsor a lottery; two of the states without a lottery offer commercial casino gaming and two others allow pari-mutuel wagering. The legal battles concerning the

definition of Class II games have often come in states that currently allow compacted Class III tribal gaming or commercial Class III gaming. In many cases, states have fought class II gaming not because they oppose gaming but because, unlike Class III gaming, Class II gaming has not become a de facto source of tax revenues for the states.

V. Conclusions

It is often noted that existing Class II games blur the line between Class II and Class III gaming. It is important to note that games similar to Class II games have not developed in Class III markets. When faced with the option of offering unlimited Class II terminals without any revenue sharing provisions or paying up to 25% of net win to the State of California for the ability to offer additional Class III games many tribes in Southern California have opted for revenue sharing and Class III terminals. This should make it clear that while government agents and regulators may not be able to distinguish between the games that there is a significant difference between the two types of gaming terminals from the consumer's perspective.

If the proposed NIGC guidelines are implemented, then there will be significant reduction in the speed at which Class II gaming devices operate. Even if the customers do not turn away from the slower machines in droves, there will be a reduction in Class II gaming revenues of between 40% and 75%. In cases where tribes face competition from other forms of gaming, including Class III tribal gaming, the impacts could be devastating. Many tribes may find themselves without sufficient revenues to fund existing tribal healthcare and education programs. The poorest tribes with the least competitive geographic locations may be the ones most affected. The overall impact

could reduce annual tribal gaming revenues from Class II gaming by over \$2 billion dollars per year. The impact will be felt not only by the tribes but in the local communities as well.